SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 853

L. C. AKINS, PETITIONER,

vs.

THE STATE OF TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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[fol. 1] [Caption omitted]

IN CRIMINAL DISTRICT COURT OF DALLAS COUNTY

MINUTE ENTRY OF PRESENTMENT

On this the 5th day of February, A. D. 1943, came the Grand Jury for the body of the County of Dallas, A quorum being present and in open court presented, and delivered to the Judge of the Criminal District Court of Dallas County, Texas, the following bill of Indictment endorsed "A True Bill" and signed by their foreman, Harry M. Smith, to-wit:

THE STATE OF TEXAS

vs.

L. C. AKINS

Murder

IN CRIMINAL DISTRICT COURT OF DALLAS COUNTY

No. 8723-A

THE STATE OF TEXAS

vs.

L. C. AKINS

BILL OF INDICTMENT—Filed February 5, 1943

In the Name and by the Authority of the State of Texas, the Grand Jurors, good and lawful men of the County of Dallas, and State of Texas, duly elected, tried, empaneled, sworn and charged to inquire of offenses committed within the body of said County of Dallas, upon their oaths do [fol. 2] present in and to the Criminal District Court of Dallas County, at the January Term, 1943, of said Court, that one L. C. Akins, on the 15th day of September, in the Year of our Lord One Thousand Nine Hundred and 41, with force and arms, in the County and State aforesaid, did then and there unlawfully, voluntarily, and with his

malice aforethought, kill V. L. Morris, by then and there shooting the said V. L. Morris with a pistol; contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State.

(Signed) Harry M. Smith, Foreman of the Grand Jury.

Dean Gauldin, Criminal District Attorney of Dallas County, Texas.

Endorsements on Instrument: No. 8723-A. The State of Texas vs. L. C. Akins. Murder, A True Bill. Harry M. Smith, Foreman of the Grand Jury. Filed Feb. 5, 1943. Pearl Smith, Dist. Clerk, Dallas County, Texas, by Sam Davis, Deputy State Witnesses; Inspector Fritz, City Hall, Mrs. V. L. Morris, W. J. Bankston, S. H. Ferguson, Dr. Edward Hall, Virgil Hughes, Hugh Gill.

In Criminal District Court of Dallas County

[Title omitted]

Defendant's Objections to the Special Venire—Filed December 13, 1943

To said Honorable Court:

Now comes the defendant in the above styled and numbered cause, L. C. Akins, and objects to being required to select a jury in this cause at this time from the special venire drawn herein for this date, and asks that said special venire be set aside and held for naught for the following reasons, to-wit:

1st. Because there was no order made therefor by any District Judge, or Judge of this Court authorized by law to make said order.

2nd. Because same was not drawn by the Clerk of this Court in the presence of or under the direction of the judge of this Court, nor in the presence of or under the direction of any Judge legally qualified to direct same or [fol. 3] to be present when same was so drawn.

In this connection this defendant says the regularly elected, qualified and acting Judge of this Court, Judge Grover C. Adams, died on August 25th, 1943, and during

a former term of this court; and that there was thereby created a vacancy in the judgeship of this Court. That no successor to said Judge has since said death been appointed by the Governor of this State as required by the Cojstitution of Texas. That the Judge who did order said venire and who was present and directed the drawing thereof by the clerk of this Court was, and is, the District Judge of the 40th Judicial District of Texas, in and for Ellis County, and was assigned to this Court by the presiding judge of the Second Administrative Judicial District of Texas. The said Presiding Judge had no legal authority to make said assignment to fill vacancy in a judgship, and that said Judge of the 40th Judicial District had no authority in law, either by reason of said assignment or otherwise, to so order said venire to be present and direct the drawing thereof. That by reason thereof said special venire is not a legal venire, and should be set aside and this defendant be not required to select a jury therefrom.

(Signed) Doss Hardin, Noah Roark, Baskett & Parks, Attorneys for the Defendant.

[File endorsement omitted.]

[fol. 4] IN CRIMINAL DISTRICT COURT OF DALLAS COUNTY

[Title omitted]

DEFENDANT'S OBJECTIONS TO TRIAL AT THIS TIME, AND BEFORE THIS JUDGE—Filed December 13, 1943

To the Honorable Judge Presiding:

Now comes the defendant in the above styled and numbered cause, L. C. Akins, and objects to the trial of this cause at this time before or in the Criminal District Court of Dallas County, Texas, and before the Honorable A. R. Stout, the District Judge for the 40th Judicial District of Texas, at, in and for Ellis County, Texas, and from any proceedings of any character whatsoever in said court and before said Judge of the 40th Judicial District of Texas, now assuming to act for the Criminal District Court of Dallas County, Texas, for the following reasons, to-wit:

First: Because there is a vacancy in the office of Judge of the Criminal District Court of Dallas County, Texas,

and the said Judge A. R. Stout was not appointed by the Governor of the State of Texas, to fill said vacancy and no one has been appointed by the Governor of the State of Texas to fill said vacancy.

In this connection this defendant says that heretofore, on the 25th day of August, A. D. 1943, and during the July Term, 1943, of the Criminal District Court of Dallas County, Texas, the Judge of said Court, to-wit, Judge Grover C. Adams, who was the regularly elected, qualified and acting judge of said court, died, That thereby, by reason of said death, the office of Judge of the Criminal District Court of Dallas County, Texas, became vacant, that under the Constitution of the State of Texas, Article 5, Section 28, which is as follows: "Vacancies in the office of Judge of the Supreme Court, Court of Criminal Appeals, the Court of Civil Appeals and District Courts, *shall* be [fol. 5] filled by the Governor until the next succeeding general election; and vacancies in the office of County Judge and Justices of the Peace shall be filled by the Commissioners Court until the next general election for such office." That the Governor of Texas has not filled said vacancy and said vacancy still exists.

In this connection this defendant says that the Honorable A. R. Stout, the Judge of the 40th Judicial District of Texas in and for Ellis County, Texas, is assuming to act as the Judge of the Criminal District Court of Dallas County, Texas in this cause under and by the authority of an assignment made by the Honorable Claude M. McCallum, Judge of the 101st Judicial District Court in and for Dallas County, Texas, acting as the Presiding Judge of the Second Administrative Judicial District of Texas. That said assignment is made under and by the terms of an amendment to Section 5, Chapter 156 of the acts of the Legislature of 1927, enacted by the 48th Legislature regular session, 1943, which said amendment adds to said Section 5 the following "And Judges may also be assigned in the manner provided for the holding of a District Court, when by reason of the death, resignation, or from any cause whatsoever the office of District Judge of the District is or has become vacant.

This defendant says that said amendment is contrary to, and in direct conflict with, said Article 5, Section 28 of the Constitution of Texas, and is wholly unconstitutional and void, and confers no authority upon the Presiding Judge

of the Administrative Districts any authority or power to assign another District Judge to hold court in another District in the event of a vacancy by death of the office of Judge of said District Court; and said Judge so assigned has no authority in law to preside over such court in which said vacancy exists, and has no legal authority or power [fol. 6] to so preside, or to make any orders, or to conduct any proceedings whatsoever in this cause in this Court or in this cause.

Second: Because this Court, the Criminal District Court of Dallas County, Texas, is not in session, but is in vacation, the October Term, A. D. 1943 having lapsed and the court adjourned for the term on the 7th day of October, A. D. 1943.

In this connection this defendant says that under the law said court has four terms per year, beginning respectively on the First Monday in January, first Monday in April, first Monday in Jury and the first Monday in October. That this would normally be the October Term, A. D. 1943, which normally would have convened on Monday, October 4th, A. D. 1943. That the duly elected, qualified and acting Judge of said Court, Judge Grover C. Adams, died on August 25th, 1943, and during the July term of said Court, and a vacancy in the office of the Judge of this court was thereby created, which said vacancy has not been filled by legal or lawful authority. That on October 4th, 1943, no legally constituted Judge of said Criminal District Court of Dallas County, Texas, appeared to open said October Term, 1943, of the said Court and no legally elected special Judge so appeared or opened said Court for said term, neither did they, or either of them, appear or open said term of said Court on October 5th, 1943, or October 6th, 1943, or on October 7th. That by reason thereof said October 1943 term of said Court was automatically, and by operation of law adjourned for said term, that is, until January 3rd, A. D. 1944.

Article 1922 of the Revised Civil Statutes of Texas, (1925) is as follows:

"Should the Judge of a district Court not appear at the [fol. 7] time appointed for holding the same and should no election of a special Judge be had, the sheriff of the county, or in his default any constable of the county, shall adjourn the court from day to day for three days; and if the Judge

should not appear on the morning of the fourth day and should no special judge have been elected, the sherif, or constable, shall adjourn the court until the next regular term thereof."

Wherefore, for the foregoing reasons, and for each and both thereof, this defendant now objects to any proceedings, trial or act herein in said Criminal District Court or by said Judge of the 40th Judicial District of Texas for Ellis County herein, or in any manner pertaining to either this defendant to this cause.

(Signed) Doss Hardin, Noah Roark, A. S. Baskett & Parks, Attorneys for the Defendant.

[File endorsement omitted.]

In Criminal District Court of Dallas County

[Title omitted]

Defendant's Motion for Instructed Verdict—Filed December 16, 1943

Now, at this time, after the State has rested her case on the testimony in chief, and before the defendant has introduced any testimony, comes the defendant and moves the court to peremptorily instruct the jury to return a verdict of "Not Guilty" herein because the testimony adduced is not sufficient to authorize a verdict of guilty against this defendant.

(Signed) Doss Hardin, Noah Roark, Baskett & Parks, Attorneys for the Defendant.

Order Overruling Defendant's Motion

The foregoing having been timely, properly, and duly presented is likewise overruled, to which the defendant excepted.

(Signed) A. R. Stout, Judge Presiding.

[File endorsement omitted.]

[fol. 8] IN CRIMINAL DISTRICT COURT OF DALLAS COUNTY

[Title omitted]

CHARGE TO JURY--Filed Dec. 16, 1943

GENTLEMEN OF THE JURY:

The defendant, L. C. Akins, stands charged by indictment with the offense of murder, alleged to have been committed in the County of Dallas, State of Texas, upon V. L. Morris, on or about the 15th day of September, 1941.

To this charge the defendant has pleaded "Not Guilty."

I give you in the court's charge, as the law applicable to this case, the following:

1

Every person of sound mind and memory and discretion who shall voluntarily kill any person within this State shall be guilty of murder.

2

Murder is distinguishable from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide, or which excuse or justify the homicide.

3

Murder, as above defined, may be committed either with or without malice aforethought. When murder is committed with malice aforethought the punishment for such murder shall be by death, or by confinement in the penitentiary for life, or by confinement in the penitentiary for any term of years not less than two years. When murder is committed, but not with malice aforethought, the punishment for such murder is by confinement in the penitentiary for any term of not less than two nor more than five years.

4

"Malice aforethought" includes all those states of mind under which the killing of a person takes place without any cause which will in law justify, excuse, or extenuate [fol. 9] the homicide. It is the doing of a wrongful act

intentionally, without just cause or excuse. It is a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken.

5

Murder without malice aforethought is a voluntarily homicide committed without justification or excuse under the immediate influence of sudden passion arising from an adequate cause, by which is meant such cause as would commonly produce a degree of anger, rage, resentment or terror in the mind of a person of ordinary temper sufficient to render the mind incapable of cool reflection.

6

Bearing in mind the foregoing instructions and definitions, you are instructed that if you should find and believe from the evidence beyond a reasonable doubt that the defendant, L. C. Akins, in the County of Dallas, and State of Texas, on or about the 15th day of September, 1941, the time alleged in the indictment, did unlawfully, voluntarily, and with his malice aforethought kill V. L. Morris by then and there shooting the said V. L. Morris with a pistol, as set forth in the indictment, then you will find the defendant guilty of murder with malice and fix his punishment at death, or by confinement in the penitentiary for life, or by confinement in the penitentiary for any term of years not less than two; but if you do not so believe, or if you have a reasonable doubt thereof, then you will acquit the defendant of murder with malice.

7

You are further instructed that if you should find and believe from the evidence beyond a reasonable doubt that the defendant, L. C. Akins, in the County of Dallas, and [fol. 10] State of Texas, did on or about September 15th, 1941, unlawfully and voluntarily kill the deceased, V. L. Morris, but you further find and believe, or have a reasonable doubt thereof, that from all the facts and circumstances in evidence in this case, the defendant in killing the deceased, if he did, was not prompted and did not act with his malice aforethought, as the same is defined to

you, in this charge, then you will find the defendant guilty of murder without malice and assess his punishment at confinement in the penitentiary for any term of years not less than two nor more than five years.

8

You are further instructed that if you don't find and believe that the defendant, under the instructions given you in this charge and under the facts in evidence, was guilty of murder, but you should have a reasonable doubt as to whether or not the defendant, in committing the offense, if he did, was prompted and acted with his malice aforethought, then you should resolve this doubt in favor of the defendant; and in such case the punishment assessed by you for said offense, if any, could not be for a longer term than five years in the penitentiary.

9

Upon the law of self defense you are instructed that when a person is unlawfully attacked or about to be attacked by another in such a manner that there is created in the mind of the person so attacked or about to be attacked a reasonable expectation or fear of death or of serious bodily injury, then the law excuses or justifies such person in resorting to any means at his command to prevent his assailant from taking his life or from inflicting upon him any serious bodily injury; and it is not necessary that there should be actual danger, as a *a* person has a [fol. 11] right to defend himself and his person from apparent danger as fully and to the same extent as he would had the danger been real, provided that he acted upon a reasonable appearance of danger as it appeared to him from his standpoint at the time; and in such case the party acting under such real or apparent danger is in no event bound to retreat in order to avoid the necessity of killing his assailant.

10

If you believe from the evidence that the defendant was attacked by the deceased in such manner that there was created in the mind of the said defendant a reasonable expectation or fear of death or serious bodily injury at the hands of the said deceased, and that the defendant rea-

sonably apprehended the danger of losing his life or of suffering serious bodily injury viewed from his standpoint at the time, and under such circumstances killed the deceased, if he did, then the law excuses or justifies the killing, or if you have a reasonable doubt thereof, you must give the defendant the benefit of such doubt and acquit him; and in this connection you are further instructed that where a person acts in his own self defense against an unlawful attack or threatened attack of another, he has the right under the law to continue to act and resist such attack or threatened attack so ling as it shall reasonably appear to him from his standpoint at the time it is reasonably necessary to act and resist such attack or threatened attack in order to protect himself therefrom.

11

You are further instructed that if you should believe from the evidence, or have a reasonable doubt thereof, that at the time of the killing of the deceased by the defendant, if he did, viewed, from the defendant's standpoint [fol. 12] at the time, that it reasonably appeared to the defendant from the acts and conduct of the deceased at the time, or from the acts and conduct of the deceased, coupled with his words, if any, that his, the defendant's, life was in danger or that he was in danger of serious bodily injury, then he is entitled to be acquitted and you should so say by your verdict.

12

You are further instructed that our statute provides that when the homicide takes place to prevent murder, maiming, disfiguring, or castration, if the weapon or means used by the party attempting or committing such murder, maiming, disfiguring or castration is such as would have been calculated to produce that result, it is to be presumed that the person so using the same designed to inflict the injury.

Now, if you believe from the evidence, or have a reasonable doubt thereof, that at the time the defendant shot the deceased, if he did, the deceased was making an attack upon the defendant with a pistol which, under the circumstances, reasonably indicated an intention to murder, maim, disfigure, or castrate him, the said defendant, or to inflict

serious bodily injury upon him, or it reasonably so appeared to the defendant, then the law would presume, and you shall presume, that the deceased intended to murder or inflict serious bodily injury upon the defendant; and, if from these circumstances, which must be viewed from the defendant's standpoint at that time, the defendant killed the deceased, or if you have a reasonable doubt thereof, then you will acquit the defendant.

13

The defendant in this case has filed an affidavit stating among other things, that he has never been convicted of a felony in this State or any other state. Our statute [fol. 13] provides that where a person is charged with the offense of murder and the jury find him guilty of murder, with or without malice, and assess his punishment at imprisonment in the penitentiary for any term of not more than five years, and they further find that the defendant has never before been convicted of a felony in this state or any other state, the jury may cause the sentence to be suspended during the good behavior of the defendant.

Now, if you find the defendant guilty of murder and the punishment assessed by you is not more than five years in the penitentiary, and you further find that he has never before been convicted of a felony in this State, you may, in your discretion, cause the sentence to be suspended during the good behavior of the defendant; and in case you desire to suspend the sentence of the defendant, let your verdict show that the defendant has never before been convicted of a felony in this State or any other state, and further show that you recommend the suspension of such sentence.

You are further charged that the term "good behavior" as used in this charge, means that the defendant shall not be convicted of any felony, or any character or grade of the offense of theft, embezzlement, swindling, conversion, theft by bailee, or any fraudulent acquisition of personal property, during the term of such suspension of his sentence.

14

You are further instructed that in deliberating upon your verdict in the case you must not consider or discuss any matter, fact or circumstance which has not been in-

troduced in evidence before you upon the trial of this case; and in reaching your verdict you are instructed that same cannot be arrived at by lot or chance; or if you should [fol. 14] determine that the defendant is guilty on any phase of the case, his term of imprisonment, if any, cannot be arrived at by adding the number of years each of you might think proper and dividing the result by twelve, and taking the result as your verdict; such methods of arriving at verdicts are not permitted by law.

15. In all criminal cases, the burden of proof is upon the State.

16. The defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt; and in case you have a reasonable doubt as to the defendant's guilt, you will acquit him, and say by your verdict "Not Guilty."

17. You are the exclusive judges of the facts proved, of the credibility of the witnesses and of the weight to be given to their testimony, but you are bound to receive the law from the court, which is herein given you, and to be governed thereby.

(Signed.) A. R. Stout, Judge Presiding.

Forms for Verdict:

1. We, the jury, find the defendant guilty of murder with malice, as charged in the indictment, and assess his punishment at death.

(Signed.) L. J. Cowart, Foreman.

2. We, the jury, find the defendant guilty of murder with malice, as charged in the indictment, and assess his punishment at confinement in the penitentiary for life.

——— ———, Foreman.

3. We, the jury, find the defendant guilty of murder [fol. 14-A] with malice, as charged in the indictment, and assess his punishment by confinement in the penitentiary for a term of —— years.

——— ———, Foreman.

4. We, the jury, find the defendant guilty of murder without malice and assess his punishment by confinement in the penitentiary for a term of —— years.

——, Foreman.

In the event that the jury find the defendant guilty, and assess a punishment against him of not more than five years in the penitentiary, and the jury should desire to suspend his sentence, then let your verdict further read as follows:

We, the jury, find that the defendant has never before been convicted of a felony in this State or in any other state and we recommend that his sentence be suspended during his good behavior.

——, Foreman.

5. We, the jury, find the defendant Not Guilty.

——, Foreman.

[File endorsement omitted.]

In Criminal District Court of Dallas County

[Title omitted]

Verdict and Judgment—December 16, 1943

This day this cause was called for trial, and the State appeared by her Criminal District Attorney, and the defendant, L. C. Akins, appeared in person, his counsel also being present, and both parties announced ready for trial, and the said Defendant in open court pleaded "Not Guilty." to the charge contained in the indictment herein; thereupon a jury, to-wit: L. J. Cowart and eleven others, was [fol. 15] duly selected, impaneled and sworn, who, having heard the indictment read, and the defendant's plea of "not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer to consider of their verdict, and afterward were brought into open Court by the proper officer, the Defendant and his counsel being present, and in due form of law returned into open court the

following verdict, which was received by the Court, and is here now entered upon the Minutes of the Court, to-wit:

"We, the jury, find the defendant guilty of murder with malice, as charged in the indictment, and assess his punishment at death.

(Signed) L. J. Cowart, Foreman.

It is therefore considered and adjudged by the Court that the said Defendant is guilty of the offense of murder with malice, as found by the jury, and that he be punished, as has been determined by the jury, by Death, and that the State of Texas do have and recover of the said Defendant all costs in this prosecution expended, for which execution will issue; and that said Defendant is remanded to the Sheriff of Dallas County to await the further order of the Court herein.

IN CRIMINAL DISTRICT COURT OF DALLAS COUNTY

[Title omitted]

DEFENDANT'S MOTION IN ARREST OF JUDGMENT—Filed Dec. 17, 1943

To said Honorable Court:

Now comes the defendant in the above-styled and numbered cause, L. C. Akins, and moves the court to arrest and hold for naught the judgment in this cause for the following reasons, to-wit:—

First

Because the indictment in this cause is invalid in law [fol. 16] for the reason that in the formation of the grand jury that returned same the negro race was discriminated against on account of his race and color in violation of the Constitution of the United States, this defendant being a member of the negro race.

Second

Because the judge who presided over the trial of this cause, Judge A. R. Stout, the District Judge of the 40th Judicial District of Texas, for Ellis County, Texas, had

no legal authority to sit in said Criminal District Court of Dallas County, Texas, or to preside over the trial of this cause, for the reason that the duly elected, qualified and acting judge of this court, Judge Grover C. Adams, died on the 25th day of August, A. D. 1943, and during a former term of this court, thereby creating a vacanc*t* by reason of said death in the judgeship of this court and the Governor has not filled said vacancy by appointment and no election has intervened since said death in which said vacancy has been filled, and the judge who presided over the trial of this cause assumed to act by virtue of an assignment by the Presiding Judge of the Second Administrative District of Texas, and not by an appointment by the Governor of Texas or by a general election.

Third

Because there was no legal session of this court at the time this cause was tried, said term having been adjourned by operation of law of October 7th, for the term, or until the next regular term of this court which will be on Monday, January 3rd, A. D. 1944. In this connection this defendant says that under the law there are four terms per year of this court, beginning on the first Monday in January, April, July and October, respectively That under the law this term of this court, being ordinarily the October [fol. 17] Term, 1943, of this court, would have convened on Monday, October 4th, A. D. 1943. That by reason of the death of the regularly elected, qualified and acting judge of this court, Judge Grover C. Adams, which death occurred on August 25th, A. D. 1943, and during the July term, 1943, of this court, thereby creating a vacancy in the judgeship of this court, which vacancy was not filled by appointment of the Governor of Texas, nor by a general election. That said vacancy existed on October 4th 1943, and has continued to exist ever since said death. That on the 4th day of October, 1943, no judge legally authorized to act as judge of this court appeared to open said court, nor did any such legally qualified judge appear on either the 5th, 6th or 7th days of October, 1943, to open said term of this court or to preside as such judge during this term. That Judge Claude M. McCallum, the judge of the 101st District Court of Dallas County, Texas, was assigned by himself as presiding judge of the First Ad-

ministrative Judicial District of Texas, to act and serve as the judge of this court, did, on October 4th, 1943, assume to open said October 1943 term of this court and did assume to open and preside over same on the 4th, 5th, 6th and 7th days of October, 1943. That no special judge was elected therefor and the said Judge Claude M. McCallum was not appointed by the Governor of the State of Texas to fill said vacancy. That he had no legal authority to open this term of this court nor to preside over same. That no judge of this court legally qualified to act as such, appeared on either the 4th, 5th, 6th or 7th days of October, 1943, to open this term of this court and no special judge having been elected therefor, under the statutes this October term, 1943, of this court was automatically adjourned until the first Monday in January, A. D. 1944, and was not in session, legally, but was in recess when this cause [fol: 18] was tried and the verdict returned herein, and the judgment rendered herein, and same are therefore nullities.

Fourth

Because by reason of the invalidity of the indictment as set forth in paragraph No. 1 of this motion; and of the fact that the judge who presided over this trial was not legally qualified to do as set forth in Paragraph No. 2 of this motion; and the fact that this court was not in legal session at the time this cause was tried and this judgment rendered, as set forth in Paragraph No. 3 of this motion; and by reason of each and all of said matters collectively and separately, this defendant has not been given a trial herein by due process of law, and the State of Texas is attempting herein, and will, deprive this defendant, who is a citizen of the United States of America and of the State of Texas, of life and liberty, and the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States of America.

Wherefore, premises considered, this defendant moves the court to arrest and set aside the judgment rendered herein upon the verdict of the jury in this cause at this time and upon this trial.

(Signed) Doss Hardin; Noah Roark, Baskett & Parks, Attorneys for the Defendant.

[File endorsement omitted.]

IN CRIMINAL DISTRICT COURT OF DALLAS COUNTY

[Title omitted]

ORDER OVERRULING MOTION IN ARREST OF JUDGMENT—December 31, 1943

Defendant's Motion for a New Trial and in Arrest of [fol. 19] judgment are each hereby overruled, to which action of the Court defendant then and there excepted and in open court, gave notice of appeal to the Court of Criminal Appeals, at Austin, Texas; Sixty days allowed for filing bills of exceptions and Statement of Facts.

(Signed) A. R. Stout, Judge Presiding.

IN CRIMINAL DISTRICT COURT OF DALLAS COUNTY

[Title omitted]

DEFENDANT'S REQUESTED SPECIAL CHARGE NO. 1—Filed December 16, 1943

Gentlemen of the Jury:

In this case you are charged that the testimony adduced upon the trial of this cause is not sufficient to authorize a verdict of guilty, and you will therefore return a verdict of "Not Guilty" herein. Requested by the Defendant.

(Signed) Doss Hardin, Noah Roark, Baskett & Parks, Attorneys for the Defendant.

The foregoing requested special charge was presented to me by the defendant after the conclusion of the testimony and before the charge of the court was read to the jury, and same is Refused, and the defendant in open court excepted to such refusal, which exception is hereby allowed.

(Signed) A. R. Stout, Judge of the Criminal District Court of Dallas County, Texas.

[File endorsement omitted.]

[fol. 20] In Criminal District Court of Dallas County

[Title omitted]

Application for Additional Time to File Bills of Exceptions—Filed February 25, 1944

To the Honorable Judge of said Court:

Now comes the defendant in the above styled and numbered cause, L. C. Akins, and shows to the Court that the time heretofore allowed him in which to prepare and file his bills of exceptions herein will expire February 28th, 1944; and that his attorneys, on account of the nature of the bills and other business pressing them, have not been able to complete same. Wherefore he prays the court to grant him an additional fifteen days from and after the time heretofore granted him, in which to prepare and file his bills of exceptions in this cause.

(Signed) Doss Hardin, Noah Roark Baskett & Parks, Attorneys for the Defendant.

In Criminal District Court of Dallas County

[Title omitted]

Order Granting Extension of Time to File Bills of Exceptions—Filed February 25, 1944

On motion of the defendant and for sufficient cause, the defendant is hereby granted an additional fifteen (15) days from and after the time heretofore allowed him in which to prepare and file his bills of exceptions in this cause.

This, the 25th day of February, A. D. 1944.

(Signed) A. R. Stout, Acting Judge of the Criminal District Court, Dallas Co. Texas.

[File endorsement omitted.]

[fol. 21] IN CRIMINAL DISTRICT COURT OF DALLAS COUNTY

[Title omitted]

DEFENDANT'S BILL OF EXCEPTIONS No. 1—Filed March 22, 1944

Be it remembered that upon the call of the above styled and numbered cause, and before the parties hereto had announced ready for trial the defendant presented to the court his motion to quash the indictment herein, which said motion was in writing and as follows, to-wit:

IN THE CRIMINAL DISTRICT COURT OF DALLAS COUNTY, TEXAS
—January Term, A. D. 1943

"No. 8723-A

THE STATE OF TEXAS

vs.

L. C. AKINS

To the Honorable Judge of said Court:

Now comes the defendant in the above styled and numbered cause, L. C. Akins, and moves the court to quash the indictment in this cause and to abate this prosecution for the following reasons, to-wit:

First:

Because said indictment is wholly insufficient in law, and charges no offense against the laws of the State of Texas.

Second:

Because in the appointment of the grand jury commissioners that drew the grand jury panel from which panel the grand jury that returned the indictment in this cause was taken, this defendant, who is a citizen of the State of Texas and of the United States of America, and who is a negro and a member of the African race, was, on account of his race, discriminated against, and was denied the equal protection of the law guaranteed him under the Constitution of the United States of America.

[fol. 22] Third:

Because in the selection and organization of the grand jury that returned this bill of indictment in this cause, to-wit, the grand jury for the January 1943 term of this court, this defendant, who is a citizen of the United States of America and of the State of Texas, and being a negro of the African race, was, by reason of his race and color discriminated against, and was thereby denied the equal protection of the law and was denied the due process of law by reason of his race and color in violation of his rights guaranteed him under the constitution of the United States of America.

In this connection this defendant would most respectfully show to the court that he is a citizen of the State of Texas, and of the United States of America, and that he is a negro, a member of the African race. That there are in Dallas County, Texas, approximately a total population of 465,000, of which number approximately 120,000 are negroes, or approximately 25% of said population are negroes. That there are in Dallas County, Texas, approximately 120,000 males over the age of twenty-one years of which number approximately 100,000 are white and approximately 20,000 are negroes over the age of twenty-one years and males, or approximately 20%, who are qualified voters and who possess the legal qualifications of grand jury commissioners, to-wit, are intelligent citizens of Dallas County, Texas, and able to read and write, are qualified jurors and freeholders in the county, are residents in different parts of said County; and who have no suit in said court that requires the intervention of a jury. That they also possess the legal qualifications of grand jurors in that they are freeholders [fol. 23] in the State or householders in said County, are citizens of the State of Texas and of Dallas County, and qualified under the constitution and laws to vote in said Dallas County, are of sound mind and good moral character; are able to read and write; who have not been convicted of a felony; and who are not under indictment or other accusation for theft or of any felony, as constitute the legal qualifications for a grand juror.

This defendant says that in Dallas County, Texas there are two Criminal District Courts with concurrent jurisdiction in felony cases and to impanel grand juries, to-wit: The Criminal District Court of Dallas County, Texas, and

the Criminal District Court No. 2 of Dallas County, Texas, each having four terms a year, said terms beginning on the First Monday in January, April, July and October of each year respectively. That said courts alternate in the appointment of grand jury commissioners and in the impaneling of grand juries for Dallas County, Texas. That the judge of the Criminal District Court No. 2 appointed the said commissioners to select the grand jury panel for the October 1942 term of said court and impaneled said grand jury for said term; and this Court appointed the commissioners to select the panel of grand jurors for this, the January 1943 term of this court, and impaneled said grand jury for said term, which said grand jury returned the bill of indictment in this cause.

That under the law jury commissioners to select the grand jury panel consist of three men possessing certain legal qualifications. That notwithstanding the number of negroes residing in Dallas County, Texas, possessing the legal qualifications of such commissioners, as aforesaid, all [fol. 24] the jury commissioners so appointed as such to select the grand jury panel for the January 1943 term of this court, were white men; and there has never been a member of the negro race appointed on such commission in Dallas County, Texas, and the negro population, by reason of their race and color have been discriminated against, and were so discriminated against in the selection and appointment of said last named grand jury commissioners. That qualified men of the negro race were discriminated against because of their race and color.

That prior to the grand jury selected in the Criminal District Court No. 2 of Dallas County, Texas, for the October 1942 term thereof, there had never been a negro chosen as a grand juror for Dallas County, Texas since the reconstruction days following the Civil War, but the qualified members of the negro race had been consistently discriminated against by reason of their race and color.

That heretofore, after the Supreme Court of the United States had reversed and dismissed the case of Henry Allen Hill vs. The State of Texas, appealed from the Criminal District Court No. 2 of Dallas County, Texas, which reversal and dismissal occurred on the — day of June, A. D. 1942, by reason of such discrimination against the negro race in the organization of the grand jury, the grand jury commissioners appointed by said Criminal District Court

No. 2 for the selection of the grand jury panel for the October 1942 term of said court, upon the instructions of the judge of said court, selected one negro on said panel of sixteen men, which negro was impaneled on said grand jury and served thereon for said term of said court; and the [fol. 25] judge of this court in appointing the jury commissioners to select the grand jury panel for the January 1943 term of this court instructed said commissioners to select a negro on said panel, and said commissioners did select one negro thereon, which said negro was impaneled and is now serving on said grand jury which is the grand jury that returned the bill of indictment in this cause. That both of said negroes possess the legal qualifications for a grand juror in this county.

In the selection of the grand jury under the laws of the State of Texas, the Judge of the Court appoints a commission of three freeholders possessing the qualifications prescribed by law, which commission selects a grand jury panel to consist of sixteen names of men qualified under the law to serve as grand jurors, from *from* which panel of sixteen the judge selects and impanels twelve to constitute the grand jury for the term. The law provides further that nine members of the grand jury may constitute a quorum and nine members may vote a bill of indictment.

This defendant says that with a grand jury composed of eleven white men and one negro, the white members of said grand jury can ignore said negro member, and nine members of the white members may vote a bill of indictment, wholly ignoring the voice of said one negro. That as constituted, one negro member of a grand jury so constituted has, in reality no voice in the matter before the grand jury; is powerless as such; and constitutes but a figure-head. That in directing the jury commissioners that a negro be placed on said panel and the placing of one negro thereon and subsequently impaneling said one negro on said grand jury as was done in this case does not constitute a compli-[fol. 26] ance with the Supreme Court of the United States in the said Hill case, nor the opinion of the Court of Criminal Appeals of Texas in the case of this defendant, is an evasion of said decisions, and constitutes a discrimination against this defendant on account of his race, and he is thereby deprived of the equal protections of the law and of the due process of law guaranteed him by the Constitution of the United States of America.

This defendant further says that said jury commissioners who drew the panel for the grand jury for this term of this court were appointed, and drew said panel, prior to January 1943, and said grand jury that returned the bill of indictment in this cause were impaneled on the 7th day of January, A. D. 1943. That at both said times this defendant was confined in the County jail of Ellis County, Texas. That therefore this defendant had been indicted for the identical offense for which he is indicted in this cause, and had been tried and convicted in the District Court of Ellis County, Texas, on a change of venue from this court, and had appealed from said conviction to the Court of Criminal Appeals of Texas, which appeal was not finally decided by said Court of Criminal Appeals until January 27th, 1943. That by reason thereof said case was pending against him and undisposed of, and this defendant was confined thereunder in the county jail of Ellis County, Texas, both at the time of the appointment of said jury commissioners and at the time the grand jury that returned the bill of indictment in this cause was impaneled, and this defendant having nothing at said time pending before said grand jury, he did not, and could not, challenge either the appointment of said commissioners or the array of said jury panel or said grand jury.

[fol. 27] Wherefore he moves the court to hear evidence hereunder and upon such hearing to quash said indictment and to abate this prosecution.

L. C. Akins, Defendant.

Sworn to and subscribed before me by the defendant L. C. Akins, on this, the 27th day of March, A. D. 1943. ——, a Notary Public in and for Dallas County, Texas. (Seal.)

And be it further remembered that upon the presentation of the foregoing motion testimony was introduced thereon and that the following is the testimony, and all of the testimony offered and admitted in evidence under said motion before the court, to-wit:

1

B. F. Brandenburg, being sworn, testified as follows:

My name is B. F. Brandenburg. I live at 831 West Tenth Street, Oak Cliff. I have lived in Dallas County all my life,

that has been 81 years. Yes, I have served in official positions in Dallas County. I was Chief of Police of Dallas one time, and I was sheriff. I was Chief of Police of Dallas 1905 to 1910. I was sheriff from 1910 to 1914. Since 1914 I have been around the court house very little. While I was sheriff and while I was Chief of Police there was never, within my knowledge, a negro member of a grand jury in Dallas County, Texas. Prior to the October term, 1942, one year ago as far as I know there was never a negro on the grand jury of Dallas County, Yes, I have acted as a jury commissioner to pick grand juries, once. That was in 1934, I believe. In selecting the jury panel of sixteen men from [fol. 28] which the grand jury was to be drawn there was not a negro on that panel of sixteen. No, sir, I never selected one at all. No, I never would have done so.

Cross-examined by the State, he Testified:

I do not remember and I cannot tell you that during the last four or five or six grand juries there have been negroes drawn on each of this past three, four, or five grand juries. No, sir, I can't tell you. Yes, sir, I know there have been negroes drawn and served on a grand jury the last year or two, one time. No, sir, I don't know how many times.

2

Sam Davis, being Sworn for the Defendant, Testified:

I am Deputy District Clerk of Dallas County, in the Criminal District Court. I have been connected with this court here four and a half years. I have connection with the duties of the court across the aisle here, Criminal District Court No. 2. I have also worked in connection with it four and a half years. I understand as a matter of law there are four terms of this court, January, April, July and October. Yes, sir, during that four and half years I have handled the grand juries for each term of this court. I had connection with it each term, and across the aisle. Prior to the October term, 1942, of the Criminal District Court No. 2, and during the time I was connected with the court, there was never a negro drawn on the grand jury. In this court, the terms being January, April, July and October, the first time a negro was ever drawn on the grand jury and served was the January Term, 1943. These other two terms of this court is where a negro has been drawn. There was one

[fol. 29] negro drawn for the January term. That was the only one on the panel of sixteen. His name fell on the list as No. 12 I believe. Those above number 12 and below 12 were white men. In the Criminal District Court No. 2 there was one negro on the panel for the October Term, 1942—a year ago. His name was John King, I believe. In the April Term of that court there was a negro drawn, there was one drawn. At the July term of this court, this last term, there was one drawn and served. In each of the jury panels of sixteen that was drawn for the October Term, 1942, and the January Term, the April term, the July term, and the October term, 1943, there was just one negro drawn on each panel. The one in October, 1943, this present grand jury, in the other court, there was one drawn but he did not serve. They had him down on the list; he was number 16, so they did not reach him. This jury list was made up by the jury commissioners. The order in which the names came on the jury list was made by the jury commissioners and not by the Clerk of the Court, and I took them as they came on the list that the jury commissioners returned into court.

Cross-examined by the State he Testified:

During the last four or five terms there has been a negro drawn on each panel. And for the last three or four terms one has served except this term. And this term one was drawn but did not serve. And the term of court in which this indictment charging this defendant with murder was returned, that would be the January term this year, 1943, there was a negro drawn on that grand jury and served.

On Re-direct Examination by the Defendant he testified:

[fol. 30] Prior to that time—October of last year—prior to the time of the United States Supreme Court's decision, I know of no negro ever having served on a grand jury in Dallas County. I do not remember about whether or not in the drawing of the special venire list or grand jury list since the reversal of the Hill case by the United States Supreme Court this June a year ago, that any instructions were given by the court to the jury commissioners saying that a negro should be drawn on the last of grand jurors.

W. H. WELLS, being sworn for the Defendant, Testified:

I reside in the City of Dallas. My business is the insurance business. I have resided in the City about twenty-three and a half years. I was one of the jury commissioners appointed in December of last year to draw the grand jury for the January 1943 term. Roy Douglas and Earnest Tennant were on that commission. I served and they also served. In the selection of our panel of sixteen for the grand jury the way we determined whom we would put on that list was, we were advised by Judge Grover Adams that the Supreme Court had ruled that we could not discriminate against any one because of his color, as I recall, they had not been discriminating for selection on the grand jury panel; and in turn they said there were sixteen, and it would be further evident if we placed one among the twelve so as to make it clear. There was nothing said about the number and nothing was said about the number on the panel. We discussed it quite a bit individually and together that we would have to recommend sixteen men for the grand jury, and two or three were discussed amongst [fol. 31] our acquaintances, and we recommended one up about Carrollton. Yes, we went straight to Carrollton; it was in the country. Yes, I remember who he was. Yes, all three of us went out to talk to him to see what he said. We did not in every instance make a personal visit to the other fifteen; if they were acceptible, being known by one or the other of us their reputation—We had no intention of placing more than one negro on the panel. When we did that we had finished with the negro. That was the suggestion of the others and what Judge Adams thought about the selection of the grand jury.

On Cross-examination by the State he Testified:

Judge Adams did not tell us to put one negro or five negroes on the grand jury. Yes, we just understood to see that negroes had representation on the grand jury, and we went out to see this particular one because we did not know him. I think we found out that he was over age. I did not even know that before. Among the white people whose names might go on the grand jury, unless I knew them personally and knew their qualifications, we went out and

talked to them. No, we did not discriminate against a white man or a negro. I attempted not to.

On Re-direct Examination by the Defendant he Testified:

I am not certain who suggested going to see this fellow. We had quite a discussion, and the Judge's suggestion, this was under the facts as we understood, and we went up there to comply with the requirements, and there were mentioned several negroes; and Judge Adams had suggested that a negro be selected on it; that it would be better representa-[fol. 32] tion to select one from another part of the county. We did not know him and we went out at the suggestion of J. D. Johnson; and he said his name was Joseph.

No, we did not go in; we found him out in the front yard when we first went there; and he said he had lived there all his life, and his father had lived there; and we wanted to know what the law required, and he seemed to be perfectly satisfactory from his conversation.

4

H. H. Williams being sworn for the Defendant, Testified:

My name is H. H. Williams. I live on Welborne street, just off of Cedar Springs, Dallas, Texas. I have lived in Dallas since 1389. Yes, I hold an official position in Dallas County at this time; it is Assistant County Auditor. I have been assistant county auditor since 1938. Prior to that time I was connected with the County government. I was first deputy District Clerk, afterwards District Clerk, I went in the District Clerk's office as deputy District Clerk in 1901, and elected District Clerk in 1906 and served eight years, and then went out and was out a while, and then went back again as deputy. While I was an assistant and District Clerk I had charge of the mechanical part of the office. Since 1889 and up to the present, prior to October, 1942, a year ago last October, there was never a negro that served on the grand jury in Dallas County, not to my knowledge; I do not remember that there was. During my tenure of office I know there was not. I only know from the records we have in the Auditor's office and the reports that come over there that there was one negro on the grand jury on [fol. 33] the April term this year, and the July term of this year; we had one negro on there. No, I don't know the relative white and colored population of Dallas County.

On Cross-examination by the State he Testified:

I know we have not had any Chinamen on the grand jury. No, I do not know how many Arabs nor how many Mexicans have served on the grand jury.

5

Ernest R. Tennant being sworn for the Defendant Testified:

Yes, sir, I am president of the Dallas National Bank. I have lived in Dallas forty years. I have been engaged in the banking business thirty-five years. Yes, I was on the jury Commission that selected the grand jury for the January term, this year, appointed by Judge Grover Adams in December 1942. Mr. Wells and Mr. Roy Douglas were *were* on the commission. In that capacity as commissioners we selected, fifteen men, I think, for the January term. I believe we selected sixteen. Yes, we complied with the law. In that list there was a negro, one negro. No, sir, I do not remember his name. He lived out northwest of town, over there about Carrollton. When the grand jury commissioners were appointed by Judge Adams the only thing I remember he said is that we could not discriminate against the negro population being represented on the grand jury. No, he just outlined if he could qualify as a grand juror. In this particular instance we selected one negro on this panel; as far as I am concerned, I read in the paper that the Supreme Court of the United States stated that a negro could sit on the grand jury. No, sir, I do not remember the Hill case. No, sir, I do not remember where it was. I don't [fol. 34] remember when I first read about that—a year and a half or two years ago. We did not then among the commissioners, Mr. Wells, Mr. Douglas and myself, about complying with that instruction from the court; we just went strai-t to get negroes in Dallas County that we could find qualified. Personally, I considered two negroes; I did not know those two even. An old negro we found up there we considered, we found out that he could not hear very well; and I did not think he was qualified; he was practically deaf. No, sir, I do not remember that he was suggested by the young man that just went out, but I think it was by one of the commissioners. We made a trip out to see him, the three of us together. We three did not

go to see any other negroes, that is the only one. I did not have any intention of putting more than one on the list; I could not think of anybody; I would have if I could have thought of another one, and putting one on. I do not remember whether there was anything said about the position he would have on the lineup, whether the twelfth, or third, or the sixteenth. I think we put his name up after it was mentioned. Neither one of the other two gentlemen with me suggested anybody else besides this man that I remember. Well, the other fifteen men on the list, the white men, we checked them. We got a City Directory and checked up; but I knew most of them personally. Yes, I thought they were thoroughly qualified.

On Cross-examination by the State he Testified:

Just we three went out to see this negro. All the other men we selected for the grand jury we knew personally, and we felt like they possessed qualifications. If I had not personally known them I certainly would have gone out to [fol. 35] see them. That is right, we were not doing any more with reference to the negro than by seeing that a negro was on the list of sixteen than the other fifteen unless we had known them. Judge Adams never mentioned to us about putting one negro on the grand jury, or five or ten. Yes, that there must be representation for the race. And we could not think of any personally that possessed the qualification, and, just as suggested, this one, and we all went out and interviewed him. According to his answers he thoroughly struck us men as being thoroughly qualified under the law, and we put his name on the list.

On Redirect Examination by the Defendant, he Testified:

Our conclusion was, of course, that he was a competent man to serve on the grand jury; that he possessed the legal qualifications necessary. In connection with the white men, as I stated, most of them were men that I personally knew. Of course, if some of the other gentlemen with me had suggested some men that I did not know personally, of course, if I did not know about him I would have wanted to investigate. I had been on the jury commission before to select a grand jury about eight or nine years ago. When a gentleman I did not know was a prospective jurors, and

the others did we just selected them from our acquaintance of the citizenship of Dallas County; you see I had lived here so long that I knew most of them.

6

JOE P. HARRIS, being sworn for the Defendant, Testified:

I am County Superintendent of Schools; that is my official position. I have been such nine years. My office is located [fol. 36] on the sixth floor of the Records Building, Dallas, Texas. In my official duties as Superintendent of Schools I have only one negro school under my supervision. That is at Sowers; all other negro schools out of town are not under my supervision. My opportunity to know of the activity of the negro race I would say was limited to some extent. This is my thirty-eighth year with the schools of Dallas County as teacher and officer. There are about 39,000 or 40,000—I believe 39,000—of the white element in Dallas and Dallas County schools; I will not say that is right, that is the exact number. Yes, that is the whites; and several elements have schools for the colored people. One is at Grand Prairie, one at Lancaster, one at Richardson, one at Vickery, one at Garland and one at Carrollton. Well, the City of Dallas not being under my supervision I cannot say whether some of the seven or eight schools maintained for the colored population are classified as high schools. They have one Senior High School; I am not sure whether this is qualified as a High School or not; I will not say about that; some six, seven, eight or nine do that work, but I am not familiar with their classifications. I have no statistics along the line of the educational merits of the negro population of Dallas County, or how many are able to read and write; but I have employed a number of colored people around at different times, and I find that most of them can read and write. I do not know what the negro population of Dallas County is.

On Cross-examination by the State he Testified:

I know a few of the Chinese population of Dallas County, but do not know what the number is. I do not know what the Spanish population of the county is, nor the Dutch or [fol. 37] the Russians. No, sir, I do not know to what extent these various races can read or write; I have no statistics on it at all. Yes, there are many numbers of

these various races that live in Dallas County; I know quite a few. No, sir, I do not know what the Jewish population of Dallas County is.

7

Ed Steger, being Sworn for the Defendant, Testified:

My name is Ed Steger. I am County Clerk of Dallas County, and have been nine years the last of this year. I have been over there as County Clerk for nine years. I have lived in Dallas County forty-eight years. Before I was elected County Clerk I was in the grain business. During the forty-eight years that I have lived in Dallas County I have known of a negro serving on the grand jury in the recent year or so; my recollection is, last year or two; that is my recollection about it. Yes, I testified in the Hill case, over across the hall. No, I did not testify in the Akins case; I was not called. It was the last year or two years that I heard about a negro serving on the grand jury; yes, within the last two years, recent years. Up until that time I had heard of no negroes serving on the grand jury; my recollection is, no.

On Cross-examination by the State he Testified:

No, I do not know how many Frenchmen, if any, have served on the grand jury, nor how many Germans, Russians or Jews.

On Redirect Examination by the Defendant he Testified:

I keep the deed records of Dallas County. I am positive there are negroes in Dallas County that own property, yes. No, I do not know how many. No, sir. I do not know ap-
[fol. 38] proximately how many property owners there are of the colored race. I imagine the percentage of the property owners of the whites and blacks is very small; the colored race is comparatively light. Yes, there is a considerable number of colored people in Dallas County who own property.

On Recross-examination by the State he Testified:

No, sir, I do not know out of that number what percent can read and write, or who have never been convicted of a felony, or who are twenty-one years of age or more.

Roy E. Douglas being sworn for the Defendant, Testified:

I am office manager for the Ford Motor Company, and have been since 1910. I do not know which grand jury commission I was on. Ernest Tennant, and I have forgotten the other boy's name, were on the commission with me. At that time Judge Adams, the judge of this court made some reference or instructions about how to select the grand jury. He thought it well to select negroes on the grand jury. He said he thought it would be well to select a negro on the grand jury. There was no further discussion about that. We did select a negro on the grand jury. All three of us went out there to see him. We all went and talked to just one negro and that is the one we selected. No, we never talked to any other negro about serving on the grand jury—I think that one. We did not go in person and talk to the fifteen members of the white race we selected on this grand jury—over the telephone. Yes, sir, there were other negroes' names mentioned besides the one we selected; we did not go talk to them; we liked this [fol. 39] one, and our intentions were to get just one negro on the grand jury; that is right. No, I did not have any intention of placing more than one negro on the grand jury.

On Cross-examination by the State he Testified:

That is right, we were not instructed by Judge Adams as to what number of negroes, but only to see that the negro race was given representation. We never agreed to select any certain number, but when we found one with all the qualifications of a grand juror we felt like that was satisfactory representation. We made it a point to get sixteen men that we found possessed of the qualifications under the law. No, sir, we did not have in mind to put any set number of representatives of the various races.

On Redirect Examination by the Defendant he Testified:

I cannot say as to others as to what they were thinking about; all that I had in mind was that it was not my intention to put more than one negro on the grand jury. That was my mind. It was my intention to put just one on so they would be represented on there. Yes, sir, I felt like one out of sixteen would be a sufficient representation I do

not know how the names of the sixteen were drawn; we gave one name to each of us, I took one name and the other men got one, on until we selected them. The negro's name was not the last one on the sixteen; I do not remember what number he was. That is right, I knew we were selecting sixteen men out of which twelve men would make up the grand jury. No, I do not know whether or not his name was the twelfth man. No, we did not go out and take to [fol. 40] any other negro. No, sir, in that conversation I and the other commissioners had with Judge Adams, that was not any reference made as to what the ruling of the Supreme Court was with reference to placing negroes on the grand jury. There was no reference made to that. Yes, I knew about it. I had read about it in the newspapers. That is the reason we placed this negro on that grand jury, to comply with the ruling of the United States Supreme Court; after Judge Adams thought it was advisable to have one on there. We knew, why, No, I did not know it was to get around the ruling of the United States Supreme Court; it was to comply with it. We placed one negro on the grand jury for that purpose and for no other purpose.

On Recross-examination by the State he Testified:

We did not agree to put eleven negroes and one white man on, no. That is right, all that we were endeavoring to get a fair and impartial grand jury without any discrimination against any race on earth. We did not have in mind, or the other commissioners, to put any set number on of any race, white, yellow or what-not.

9

C. D. Johnson (col.) being sworn for the Defendant Testified:

My name is C. D. Johnson. I live out here, you might say, Farmers' Branch, between Farmers' Branch and Carrollton. I have lived there about seventy-five years. I am eighty-one years old. I was practically raised out there. My father lived there before me, while I was a boy and before I was born. I did own my farm there. The old home place has been sold. I do not own any thing there [fol. 41] now. Mr. Marion Church owns the place, and I live there now. Yes, sir, I own real estate property, but

I live on this Marion Church farm. I raise hogs, chickens and turkeys. No, sir, I do not raise any corn. Yes, sir, I belong to the African or negro race. I can read and write. I went to school when I was a boy. I went to school at White Rock and Carrollton. Oh, yes, I served on the grand jury here last January; it will be a year next month. Yes, I remember some men coming out there and talking to me about serving on the grand jury, and in the selecting room. I was selected to serve on it for the January term for three months. No, sir, there was no other member of my race, besides me, on that grand jury, not on that panel. What are you getting at, anyway? It looks like to me that the way things are going you don't give the colored race and show; and after it has gone this far I don't think this is a democracy; I think the way things are going that this country will never be a true democracy. No, sir, I never knew of a colored man serving on the grand jury before I served; yes, I knew about John King serving the term before that. Yes, sir, that is the only time I have ever known it, and at the time I served. I used to be pretty well acquainted with the colored population of Dallas County, but I have lost track of a whole lot of people I used to know. Yes, sir, I know whether or not there are colored people in Dallas County that own their property and homes; a number of them own valuable property. There used to be some of them that own property in that community, and in Texas, and in Dallas County, but I don't know much about that now. Yes, sir, I know that there are members of my race that are physicians, and preachers and teachers and [fol. 42] things like that. I used to know them, but I can't think of all of them. This discrimination, I do not understand that; I really think we are being discriminated against; I don't think this country can ever become a true democracy.

10.

CARL F. BARTH being Sworn for the Defendant Testified:

I am the Regional Manager of the Western Department of Commerce. I have held that position two and a half years. I have lived in Dallas County off and on since 1921. I have the 1940 Census of *of* Dallas County. I am custodian of it. From that, the number of *of* white population in Dallas County in 1940 was 336,851. Yes, sir, from that I can tell the black population in Dallas County in 1940.

The negro population was 61,605. No, I cannot say what percentage of that 61,605 are property owners in Dallas County. I do not have those figures with me. No, sir, I do not know what percentage of that 61 thousand and some odd can read and write. I have not had occasion to talk with any of the negro population only to the extent when I might casually come in contact with them. Certainly I know that there are negroes in Dallas County that can read and write; but I do not know the exact percentage.

On Cross-examination by the State he Testified:

No, sir, I do not know what percentage of that sixty-one thousand and something are above the age of twenty-one years, and can read and write, and who never have been convicted of a felony, and who own real estate.

[fol. 43] 11

M. H. Jackson (col.) being Sworn for the Defendant, testified:

I am a minister. I have lived in Dallas County forty-three years. I belong to the New Hope Baptist Church. I have been the minister of that church since 1929. I went to school here in Dallas, and then in Atlanta, Georgia and Chicago. I finished in the Northwestern University in Chicago. Yes, sir, I own property here in Dallas. I have paid my poll tax for 1942. During the 43 years I have lived in Dallas County I have heard of a colored person serving on a grand jury in this county in 1942. No, sir, prior to that time I do not. No, I do not know how many colored people there are in Dallas County that can read and write; I have no statistics on that. I have about 800 members in my church. All of that 800 but one can read and write that I know about. Yes, I know that there are a number of colored school teachers in Dallas County; over two hundred. There are more than a hundred churches in Dallas County; and most of these churches have one or more preachers. I suppose they can read and write. Yes, sir, I know of colored people in Dallas County who own property in Dallas County. I cannot give you the exact figures on how many there are, but I know a great many.

On cross-examination by the State he Testified:

I do not have any idea personally about how many negroes ought to be on a grand jury; nor about how many Chinamen ought to be on a grand jury.

12

Dr. E. E. Ward (col.) being Sworn for the Defendant, Testified:

[fol. 44] My name is E. E. Ward. I am a physician. I am a M. D. I went to school at Mahaffey College. I graduated there. That is specially a medical and pharmacy college for colored people. I belong to that race. I have lived in Dallas County 51 years. During that 51 years I have never been called to serve as a member of a grand jury. Yes, I own property here. I bought $250,000.00 of war bonds. I am connected with the Excelsior Life Insurance Company. I am president of it. That company has bought $250,000.00 of war bonds. We employ sixty people up there. That includes Dallas County. All of the sixty people we employ in Dallas County can read and write. Well, I don't know the exact figures of how many men and how many women we employ up there. Fifty per cent of that sixty that we employ own property in Dallas County. I do not know of any of them that has been called to serve on the grand jury. I have known of a negro serving on a grand jury in Dallas County only in 1942. Up until 1942 I had not known of a colored person serving on a grand jury. I do not know the colored population of Dallas County.

Cross-examined by the State he Testified:

Up until 1942 I had never heard of any colored people serving on a grand jury. Since then there has been one drawn on grand juries, and at every term there has been one served except the present term.

13

David B. Garner (col.) being Sworn for the Defendant, Testified:

My name is David B. Garner. I am fifty-seven years old. I am a member of the colored race, very much so. I am now employed at the Federal Reserve Bank. I have been

[fol. 45] employed there twenty-two years last May. I have been paying my poll tax before I went to work for the Federal Reserve Bank, probably ten years. Yes, sir, I have been paying my poll tax in Dallas County approximately thirty-three years. I have been in Dallas County thirty-one years, and I paid the first year I came here. I bought my home from Mr. Tom Camp in 1916 and I live at the same place yet. No, sir, I have never been called upon to serve as a member of a grand jury. I do not know to my knowledge of any colored people who has. I do not know of any colored person who has served on a grand jury in Dallas County up to 1942; that was back there and one served then. Up until then I never heard of one. Yes, sir, there are other colored people who work up there where I am, something like thirty, probably. I know one portion of them. Since the war most of the old ones are gone I knew once. I know well they owned property in Dallas County. None of them have been called to serve on the grand jury since my employment. The colored population of Dallas County—a man called that—I think is was some sixty thousand, that is as near as I can get it. I *I* don't have the correct answer what the percentage of the colored people in Dallas County that can read and writ*r*, but I know that a good number can read and write. Over thirty among those with whom I work in that position can read and write. They have to fill out their application to get that position there. That is the reason I know.

On cross-examination by the State he Testified:

I know of some who have served on the grand juries from the papers, the last two or three years. There has been one on the grand jury ever since the early part of 1942. [fol. 46] They had Mr. Johnson and C. W. Pratt.

14

C. W. Pratt (col.) Being Sworn for the Defendant, Testified:

My name is C. W. Pratt. I rather think I am a member of the colored race; I have been so regarded. I teach school. I teach at the Frazier School in Dallas. Oh, I have been teaching school a long time; I have been here twenty-one years. I went to school at the University of Nashville;

Tennessee, in New York and in Chicago. I went to the University of Chicago in Chicago. Yes, sir, I took a Master's degree there. I own several pieces of property in Dallas County. I was called on the petit jury I believe it was in 1935. Yes, I have been called on the grand jury. That was in July, 1943. I served on the grand jury in July, August and September, 1943. The grand jury commissioners that selected me were Mr. Wood, Mr. Goode and another man, Mr. Evans. I knew Mr. Wood personally. He had been Superintendent of our schools for several years. No, he didn't talk to me; one man talked to me over the telephone. That was J. Howard Payne, the postmaster. No, sir, he did not ask me anything about serving on the grand jury. No, sir, I was not on the grand jury then. Nobody had talked to me about serving on the grand jury. Mr. Wood never did talk to me about serving on the grand jury. After I was selected he never did talk to me about serving on the grand jury. He never discussed that. Up until I was on there neither of these three men ever talked to me up until August, and he talked to me then. What was said was he asked me how I was getting along, and I told him all right. No, I had never been called to serve before [fol. 47] that time. The colored population of Dallas County is around sixty thousand. I do not know definitely what percentage of that sixty thousand can read and write, but from my work with them, a very large percent, I would call a large percent ninety or ninety-five percent. I do not know of any other colored person having served on the grand jury until last year, not before then.

On Cross-examination by the State he Testified:

I think the grand jury I was on was the third that my race was represented on. I was on the third one, July, August and September of this year.

On Re-direct Examination by the Defendant he Testified:

We consider there are around two hundred and fifty colored school teachers in Dallas County. In my twenty-one years in this county I have never heard of any one of them that has been called to serve on a grand jury.

15

E. L. CUSHENBERRY (col.) being Sworn for the Defendant, Testified:

My name is E. L. Cushenberry. I am a member of the colored race. I am sixty years old. I have lived in Dallas County 35 years. I own property here. I have owned it since 1909. During that period from 1909 until now I have not ever been called upon to serve on a grand jury in Dallas County. No, sir, I do not know of anyone of the negro race that has, not one. That is, I mean only within the past year. I do know about those called the last year. But from 1909 up until last year I know of no member of the colored race serving on a grand jury. The population of the colored race in Dallas County I judge is be-
[fol. 48] tween fifty and sixty thousand. In my contact with them, I find probably ninety-five percent of that fifty or sixty thousand can read and write; you seldom see one that cannot. My business is I own a cafe and barber shop. They are located at Hall and Commerce streets. No, sir, I have never been called to serve on the grand jury.

16

DR. R. L. HESTER (col.) being Sworn for the Defendant Testified:

I am Grand Chancellor of the Grand Lodge of Knights of Pythias in Texas. I have held that position since June 1, 1940. I have lived in Dallas County thirteen years. I do not own any property in Dallas County. I pay my poll tax every year. I own property in Texas, at Brownwood, which is in Brown County. I am not in any business except with the Lodge; you know it takes all of my time as supervisor of the State. I judge I have about five hundred members here and in Texas. During my thirteen years in Dallas County I have never heard of a negro serving on a grand jury prior to 1942. After that, I did. I know about what the colored population of Dallas County is by the information given out by the gentleman here who had charge of the census. Based upon my lodge members of 500 members here and in the State, I know practically every one of them personally, I would say less than ten percent cannot read and write. Well, of that 500 here and in the State, I would say approximately fifty percent of them own property;

own property in Dallas County. To my knowledge none of that 500 have been called upon to serve on the grand jury. That is true, no colored person to my knowledge has been called upon to serve on the grand jury until 1942.

[fol. 49] 17

G. F. PORTER (col,) being Sworn for the Defendant, Testified:

My name is G. F. Porter. I am a member of the colored race. My age is sixty. I reside in the State of Texas, City of Dallas, in Dallas County, Texas. I owned real estate here until very recently. I do not own any real estate in the State of Texas now. I did own real estate in Texas for a number of years. I can't say how long. I have lived in Dallas County since 1916. I was born in Georgia. My business now is, I have subscriptions writing. Before I took that I was in charge of the Wylie Junior College. I never have since I have lived in Dallas County been called upon to serve on the grand jury. I am pretty well acquainted with the colored population of Dallas. I can't say exactly what percentage of the colored population in Dallas own real estate in Dallas or in Texas, either Dallas County or elsewhere; the percentage is rather large. It will approach fifty percent.

18

J. F. JONES (col.) being Sworn for the Defendant, Testified:

My name is J. F. Jones. I live at 3818 Morrell Street. I have lived in Dallas County thirteen years, about. Yes, sir, I have been engaged in the insurance business, thirteen years. I own my own home. I have owned real estate five years. I pay my poll tax. I am thirty-eight years of age. I went to school in Henderson, Texas. I can read and write. In my business in the insurance business I have a pretty wide acquaintance in Dallas and Dallas County. From my acquaintance among them I would say about [fol. 50] ninety percent, or nearly all of the colored population in Dallas County can read and write,—about ten thousand. I would say about 250 of that ten thousand own real estate or their homes. I have never known of any of them being summoned to serve on a grand jury here in Dallas County. Prior to last October I have never known of any

colored person serving on a grand jury in Dallas County since I have been here.

On Cross Examination by the State he Testified:

Well, about six thousand of them paid their poll tax in the year 1942. No, sir, of that number I do not know how many are males. Of that number all were above the age of twenty-one. No, I do not know how many of them have been convicted of a felony. There were about 200 exemptions in that number. I do not know how many Spaniards live in Dallas County; nor how many Frenchmen live in Dallas County; nor how many Englishmen; nor how many Jews.

19

Charles T. Brackins (col.) being Sworn Testified for the Defendant as follows:

My name is Charles T. Brackins. I am a member of the colored race. I have lived in Dallas County fifty-nine years. I have owned property in Dallas County, oh, about forty years I guess. In that forty years that I have owned property in Dallas, Dallas County I have never been called on to serve as a member of the grand jury. I know one member of my race who has. No, that was not up to 1942. I knew one in 1942, last year. Up until that time I have not known of any member of my race to be called on to serve on a grand jury. I own probably fifty thousand dollars worth of property in Dallas County. I am in the insurance and [fol. 51] surety bond business. The insurance company I am connected with is the Lloyds Casualty Insurance Company. In that Insurance business I employ forty or fifty people. I have an employment agency. No, sir, I don't know of my own knowledge approximately how many colored people in Dallas County who own real estate, property here or in the State. Personally I know about two thousand who do own property here or either in the State of Texas. I do not know of any of them who have been called to serve as a member of a grand jury in Dallas County up to the time I speak of; none up to 1942. All of that two thousand that I know who own property here or in the State of Texas, can read and write. All of them I know own property.

On Cross-examination by the State he Testified:

That two thousand I know can read and write. To sit up here, from memory, I think it would be impossible—just like looking at a City Directory—I can't name them all. I know the one on there that served last year. I don't know which grand jury indicted this defendant. No, sir, I don't know which grand jury found the indictment. On this last indictment I think they all went out in the country and got one. No, sir, it would make no difference whether they went out in the country and got one or not. Yes, sir. there was one.

20

W. I. Dickson (col.) being Sworn for the Defendant Testified:

My business is I try to run a shoeshop. I am a member of the colored race. I have lived in Dallas County 19 years. I own property here. I have owned that property three years. During the 19 years I have been in Dallas County I do not know of any member of my race [fol. 52] that have been called to serve on the grand jury not until last year. I have never been called to serve on the grand jury. No, sir, I do not know what the population of Dallas County of colored people is; about sixty-five thousand I think. Seventy-five percent of that 65,000 can read and write, I imagine. I employ four where I work. They can read and write. They have never been called to serve on a grand jury.

On Cross-Examination by the State he Testified:-

How many of them that I know in Dallas County that pay their poll tax I really don't know. No, sir, I don't know. That own real estate, I think a number of them do; I don't know how many.

21

Roy F. Walker (col.) being Sworn for the Defendant, Testified:-

I am a member of the colored race. I am a teacher, school teacher. I have been teaching school in Dallas County ten years. I went to school at the Howard University, Washington, D. C. I own property here. I have owned it since

February, 1942. I never got a chance to serve as a member of the grand jury; I never got to it. Not until recently have I known of a member of my race that has. No, sir, up until 1942 there had been none, that I know about. I only heard it said the population of colored people in Dallas County, 61,000. There are 246 colored school teachers in Dallas City, and more than that in the county. They were systematically excluded before they had a chance to serve on *on* the grand jury."

Testimony on the Motion Closed.

Which said motion the court then and there in all things overruled. To which said action and ruling of the court [fol. 53] the defendant then and there, in open court, excepted, and here now tenders this, his Bill of Exceptions No. 1 thereto, and asks that the same be examined, approved, signed and filed as a part of the record in this cause.

The foregoing bill of exceptions is here now by me examined, approved, signed and ordered filed as a part of the record in this cause.

(S) A. R. Stout, Acting Judge of the Criminal District Court of Dallas County, Texas.

[File endorsement omitted.]

[fol. 54] IN CRIMINAL DISTRICT COURT OF DALLAS COUNTY

[Title omitted]

DEFENDANT'S BILL OF EXCEPTIONS No. 2—Filed March 22, 1944

Be it remembered that upon the call of the above styled and numbered cause for trial the defendant presented to the court in writing his objections to going to trial before the Honorable A. R. Stout, the District of the 40th Judicial District of Texas and from any proceedings whatever in the Criminal District Court of Dallas County, Texas, at this time, which said objections were as follows:-

"No. 8723-A

IN THE CRIMINAL DISTRICT COURT OF DALLAS COUNTY, TEXAS —October Term, A. D. 1943

THE STATE OF TEXAS,

vs.

L. C. AKINS

To the Honorable Judge Presiding:

Now comes the defendant in the above styled and numbered cause, L. C. Akins, and objects to the trial of this cause at this time before or in the Criminal District Court of Dallas County, Texas, and before the Honorable A. R. Stout, the District Judge for the 40th Judicial District of Texas at, in and for Ellis County, Texas, and from any proceedings of any character whatsoever in said court and before said Judge of the 40th Judicial District of Texas, now assuming to act for the Criminal District Court of Dallas County, Texas, for the following reasons, to-wit:-

First:-

Because there is a vacancy in the office of judge of the Criminal District Court of Dallas County, Texas, and the said Judge A. R. Stout was not appointed by the Governor of the State of Texas to fill said vacancy and no one has been appointed by the Governor of Texas to fill said vacancy.

In this connection this defendant says that heretofore, on the 25th day of August, A. D. 1943, and during the July [fol. 55] Term, 1943, of the Criminal District Court of Dallas County, Texas, the judge of said court, to-wit, Judge Grover C. Adams, who was the regularly elected, qualified and acting judge of said court, died. That thereby, by reason of said death, the office of judge of the Criminal District Court of Dallas County, Texas, became vacant. That under the Constitution of the State of Texas, Article 5, Section 28, which is as follows:- "Vacancies in the office of judge of the Supreme Court, Court of Criminal Appeals, the Court of Civil Appeals and District Court *shall* be filled by the Governor until the next succeeding general election; and vacanies in the office of County Judge and Justices of the Peace shall be filled by the Commissioners Court until the next general election for such office." That the Governor of Texas has not filled said vacancy and said vacancy still exists.

In this connection this defendant says that the Honorable A. R. Stout, the Judge of the 40th Judicial District of Texas, in and for Ellis County, Texas, is assuming to act as the judge of the Criminal District Court of Dallas County, Texas, in this cause under and by the authority of an assignment made by the Honorable Claude M. McCallum, Judge of the 101st Judicial District Court in and for Dallas County, Texas, acting as the Presiding Judge of the First Administrative Judicial District of Texas. That said assignment is made under and by the terms of an amendment to Section 5 Chapter 156 of the Acts of the Legislature of 1927, enacted by the 48th Legislature, regular session, 1943, which said amendment adds to said Section 5 the following:- "And judges may also be assigned in the manner herein provided for the holding of District Court when by reason of death, resignation, or for any cause whatsoever the office of District Judge of the District is, or has become vacant." [fol. 56] This defendant says that said amendment is contrary to and in direct conflict with, said Article 5, Section 28 of the Constitution of Texas, and is wholly unconstitutional and void, and confers no authority upon the Presiding Judge of the Administrative Districts any authority or power to assign another District Judge to hold court in another District in the event of a vacancy by death of the office of judge of said District Court; and said judge so assigned has no authority in law to preside over such court

in which said vacancy exists, and has no legal authority or power to so preside, or to make any orders, or conduct any proceedings whatsoever in this cause in this court or in this cause.

Second:-

Because this Court, the Criminal District Court of Dallas County, Texas, is not in session, but is in vacation, the October Term, A. D. 1943, having lapsed and the Court adjourned for the term on the 7th day of October, A. D. 1943.

In this connection this defendant says that under the law said Court has four terms per year, beginning respectively on the First Monday in January, first Monday in April, first Monday in July and the first Monday in October. That this would be normally the October Term, A. D. 1943, which normally would have convened on Monday, October 4th, A. D. 1943. That the duly elected, qualified and acting Judge of said Court, Judge Grover C. Adams, died on August 25th, 1943, and during the July term of said Court, and a vacancy in the office of the judge of this Court was thereby created, which said vacancy has not been filled by legal or lawful authority. That on October 4th, 1943 no legally constituted Judge of said Criminal District Court of Dallas County, Texas, appeared to open said October [fol. 57] Term, 1943, of said court and no legally elected Special Judge so appeared or opened said court for said term, or either of them appear or open said term of said court on October 5th, 1943, or October 6th, 1943, or on October 7th, 1943. That by reason thereof said October 1943 term of said court automatically, and by operation of law, adjourned for said term, that is, until January 3rd, A. D. 1944.

Article 1922 of the Revised Civil Statutes of Texas (1925) is as follows:-

"Should the judge of a district court not appear at the time appointed for holding the same and should no election of a special judge be had, the sheriff of the county, or in his default, any constable of the county, shall adjourn the court from day to day for three days; and if the judge should not appear on the morning of the fourth day and should no special judge have been elected, the sheriff, or constable, shall adjourn the court until the next regular term thereof".

Wherefore, for the foregoing reasons, and for each and both thereof, this defendant now objects to any proceedings, trial or act herein in said Criminal District Court or by said Judge of the 40th Judicial District of Texas for Ellis County, herein, or in any manner pertaining to either this defendant or to this cause.

Doss Hardin, Noah Roark, Baskett & Parks, Attorneys for the defendant."

And be it further remembered that upon the presentation of the foregoing objections to the court the following stipulations were made in open court by the attorneys for the State and the defendant as to the facts with reference to said objections, to-wit:-

"That Judge Grover C. Adams was the regularly elected and qualified and acting judge of this, the Criminal District [fol. 58] Court of Dallas County, Texas. That Judge Adams died August 25, 1943, during the July Term, 1943, of this Court, and that the Governor of Texas has not appointed a judge to fill the vacancy occasioned by the death of Judge Adams. That Judge A. R. Stout, Judge of the 40th Judicial District of Texas for Ellis County, Texas, is acting herein by virtue of assignment by Judge Claude M. McCallum, Judge of the 101st Judicial District Court of Dallas County, Texas, and acting as the Presiding Judge of the First Administrative Judicial District of Texas, and not by virtue of any appointment by the Governor of the State of Texas.

That there are four terms of this court under the statute, beginning on the first Monday in January, April, July and October, respectively, of each year. That on the first Monday in October, 1943, being the October 4, 1943, Judge Claude M. McCallum, Judge of the 101st Judicial District of Dallas County, Texas, acting under an assignment from himself as Presiding Judge of the First Administrative Judicial District of Texas, opened the October Term, 1943, being the present term thereof, and convened the same on the 4th, 5th 6th and 7th days of October, respectively, by reason of said assignment, and that no judge was appointed therefore by the Governor to preside and open said Court; and that no Special Judge was elected therefor, except said assignment as set forth above."

Which said objections the Court then and there in all things overruled, and put this cause to trial and said cause

then and there proceeded to trial in said Court before Judge A. R. Stout.

To which said action and ruling of the Court the Court the defendant then and there, in open court, excepted, and he here now tenders this, his Bill of Exceptions No. 2 thereto, and asks that the same be examined, approved, [fol. 59] signed and filed as a part of the record in this cause.

The foregoing bill of exceptions is here now by me examined, approved and ordered filed as a part of the record in this cause.

(Signed) A. R. Stout, Acting Judge of the Criminal District Court of Dallas County, Texas.

[File endorsement omitted.]

IN CRIMINAL DISTRICT COURT OF DALLAS COUNTY

[Title omitted]

DEFENDANT'S BILL OF EXCEPTIONS NO. 3—Filed March 22, 1944

Be it remembered that upon the call of this cause for trial in the Criminal District Court of Dallas County, Texas, a Special Venire having been drawn and summoned from which to select a jury for this trial, the defendant presented to the court in writing his objections to being required to select a jury from said special venire, and asked that said special venire be set aside and held for naught, which said objections were as follows, to-wit:

"IN THE CRIMINAL DISTRICT COURT OF DALLAS COUNTY, TEXAS, OCTOBER TERM, A. D. 1943

No. 8723-A

THE STATE OF TEXAS

vs.

L. C. AKINS

To said Honorable Court:

Now comes the defendant in the above styled and numbered cause, L. C. Akins, and objects to being required to

select a jury in this cause at this time from the special venire drawn herein for this date, for the following reasons, to-wit:

[fol. 60] 1st. Because there was no order made therefor by a District Judge, or Judge of this Court, authorized by law to make said order.

2nd. Because there was not drawn by the Clerk of this Court, in the presence of, or under the direction of the judge of this court, nor in the presence of or under the direction of any Judge legally qualified to direct same or to be present when same was so drawn.

In this connection this defendant says the regularly elected, qualified and acting judge of this court, Judge Grover C. Adams, died on August 25th, 1943, and during a former term of this Court; and that there was thereby created a vacancy in the judgeship of this Court. That no successor of said Judge has since said death been appointed by the Governor of this State as required by the Constitution of Texas. That the Judge who did order said venire and who was present and directed the drawing thereof by the Clerk of said court was, and is, the District Judge of the 40th Judicial District of Texas, in and for Ellis County, and was assigned to this Court by the Presiding Judge of the First Administrative Judicial District of Texas. That said presiding judge had no legal authority to make said assignment to fill a vacancy in a judgeship, and that said Judge of the 40th Judicial District had no authority in law, either by reason of said assignment or otherwise to so order said venire or to be present and direct the drawing thereof. That by reason thereof said special venire is not a legal venire, and should be set aside and this defendant be not required to select a jury therefrom.

Doss Hardin, Noah Roark, Baskett & Parks, Attorneys for the Defendant.

And be it further remembered that upon the presentation of the foregoing objections to the court it was agreed and [fol. 61] stipulated by the attorneys for the State and the defendant as follows, as to the facts pertaining thereto, to-wit:

"That Judge Grover C. Adams was the regularly elected, qualified and acting judge of the Criminal District Court of

Dallas County, Texas; that Judge Adams died August 25th, 1943, during the July Term, 1943 of this court, and that the Governor of Texas has not appointed a judge to fill the vacancy caused by the death of Judge Adams. That Judge A. R. Stout, of the 40th Judicial District of Texas, for Ellis County, Texas, is acting herein by virtue of assignment by Judge Claud M. McCallum, Judge of the 101st Judicial District Court of Dallas County, Texas, and acting as the Presiding Judge of the First Administrative Judicial District of Texas, and not by virtue of any appointment by the Governor of the State of Texas.

"That there are four terms of this court under the statute, beginning on the first Monday in January, April, July and October respectively of each year. That on the first Monday in October, 1943, it being October 4th, 1943, Judge Claude M. McCallum, Judge of the 101st Judicial District Court of Dallas County, Texas, acting under an assignment from himself as the Presiding Judge of the First Administrative Judicial District of Texas, opened the October Term, 1943, of this Court, being the present term thereof, and convened the same on the 4th, 5th, 6th & 7th days of October, 1943, respectively, by reason of said assignment, and that no judge was appointed therefor by the Governor to preside and open said court; and that No Special Judge was elected therefor except said assignment as set forth above.

"That the Special venire in this case was ordered by Judge A. Royce Stout, Judge of the 40th Judicial District Court of Texas, for Ellis County, and by virtue of the assignment set forth above from the Presiding Judge of the [fol. 62] First Administrative Judicial District of Texas; and he was present and presided through the drawing of said special venire; and that no Judge appointed by the Governor of Texas to fill said vacancy caused by the death of Judge Adams ordered said special venire and presided or was present during the drawing of the same from the jury wheel."

Which said objections the court then and there, in all things overruled, and directed that the jury be selected from said special venire, and the jury that sat upon the trial of this cause was so selected from said special venire.

To which said action and ruling of the court the defendant then and there, in open court, excepted, and here now tenders this, his bill of exceptions No. 3 thereto, and asks

that the same be examined, approved, signed and filed as a part of the record in this cause.

The foregoing Bill of Exceptions is here now by me examined, approved, signed and ordered filed as a part of the record in this cause.

(Signed) A. R. Stout, Acting Judge of the Criminal District Court of Dallas County, Texas.

[File endorsement omitted.]

IN CRIMINAL DISTRICT COURT OF DALLAS COUNTY

[Title omitted]

DEFENDANT'S BILL OF EXCEPTIONS NO. 4—Filed March 22, 1944

Be it remembered that upon the trial of the above styled and numbered cause, after the State had rested her case in chief on the testimony and before the defendant had intro-
[fol. 63] duced any testimony, the defendant presented to the court his motion for a peremptory instructions to return a verdict of "not guilty", which said motion was in writing and in words and figures as follows:

IN THE CRIMINAL DISTRICT COURT OF DALLAS COUNTY, TEXAS, OCTOBER TERM, A. D. 1943

No. 8723-A

THE STATE OF TEXAS

vs.

L. C. AKINS

Now, at this time, after the State has rested her case on the testimony in chief, and before the defendant has introduced any testimony, comes the defendant and moves the court to peremptorily instruct the jury to return a verdict of "Not Guilty" herein because the testimony adduced is not sufficient to authorize a verdict of guilty against this defendant.

Doss Hardin, Noah Roark, Baskett & Parks, Attorneys for the Defendant."

which said motion the court then and there, in all things, overruled and refused. To which said action and ruling of the Court the defendant then and there, in open court, excepted, and here now tenders this, his bill of Exceptions No. 4 thereto, and asks that the same be examined, approved, signed and filed as a part of the record in this cause.

The foregoing bill of exceptions is here now by me examined, approved, signed and ordered filed as a part of the record in this cause.

(Signed) A. R. Stout, Acting Judge of the Criminal District Court of Dallas County, Texas.

[fol. 64] In Criminal District Court of Dallas County

[Title omitted]

Defendant's Bill of Exceptions No. 5—Filed March 22, 1944

Be it remembered that upon the trial of the above styled and numbered cause it was developed by the testimony that in the difficulty in which the deceased, V. L. Morris, was killed the deceased had shot the defendant before the defendant *shot the defendant* had shot the deceased; that after the deceased had shot the defendant the defendant obtained the pistol of the deceased from the deceased and shot the deceased with the deceased's own pistol. That the defendant immediately went to the police station in Dallas and delivered the pistol to a police officer and surrendered to said officer, and defendant was sent to the Parkland Hospital for treatment of his wounds and he was so treated in said hospital in the City of Dallas, Texas. That said Parkland Hospital kept a record of the treatment and nature and location of the wounds found on the person of the defendant, and upon said trial it became an issue and a material inquiry as to the relative positions with reference to each other of the defendant and the deceased at the time the deceased shot the defendant as to whether the defendant was advancing toward the deceased or whether he had his back towards the deceased. That thereupon the defendant offered in evidence said hospital record of said Parkland Hospital, which is in words and figures as follows:

"Aken. Emergency Service—Parkland Hospital. No. 6365. n. H.

(This card will be filled out on every patient given Emergency care or treatment.)

Time 9:59 P. M. Date 9-15-41. Fee —.

Name—Akin, L. C. Address 923 E. Tenth.

[fol. 65] Sex M. Color Col. Age 26. Occupation (Porter).—(1) (Employer Van Winkle Motor S. Address Oak Laws (2) (3) Accident case—Yes. Who responsible? Hurt on Duty? No. Here before; in Hosp. Yes. In Dispens. Yes. No. 1598. In Emerg.? Yes. History, physical and diagnosis; Shot in the back. (4) 9:00 P. M. 94/54 P. 106 R. 10:20 P90. Condition, good & disch. to jail ward.

Treatment MS. 1/6 gr. Xray. Quendelenkey (?) 1000 cc 5% Glucose. Disposition, jail.

Bowyer, House Staf. MFR.

/c Alone. Black & Clark.

(On the reverse side of said record:)

The undersigned, without reservation do hereby give full consent for the doctors and hospital officers of Parkland Hospital to Examine, Treat and to perform such surgical operations as they deem necessary for the treatment of

Patient's Name (If Minor, State age.)

Undersigned can not pay for hospital services rendered.

Signed. Relation,

Dallas, 7 yrs. Family, 4. Income, $14.00 wk.

Bill fold to Business Office.

Subcutaneous Emphysema—No apparent Pneumo. & hozox.

Wound of entrance 2½" below mid axilla—wound of exit 2" from vertebrae Spine on level of scapula—Rt. side.

Bowyer."

To the admission of said record in evidence the State then and there objected, and the court then and there sustained said objections of the State, and refused to admit same in evidence, the following portions of said report, to-wit:

"(Employer—Van Winkle Motor S. Address Oak [fol. 66] Lawn) (2) (3) Accident Case—Yes. Who responsible? Hurt on Duty? No: History, Physical and Diagnosis: Shot in back. (4) 9:00 p. m. BP 94/54 P 106 R. 10:20 P90."

Dallas—7 yrs. Family—4. Income—$14.00 Wk.

Bill fold to Business office.

Subcutoneous Emphysema—No apparent Pneumo. $ Ho zox.

Wound of entrance 2½" below mid axilla—wound of exit 2" from vertebrae spine on level of tip of scapula—Rt. side.

Bowyer."

And same was not admitted in evidence before the jury, but the remaining portion thereof was so admitted.

To which said action and ruling of the court in so sustaining said objections to same and in refusing to admit in evidence the portion thereof set forth above as not admitted, the defendant then and there, in open court, excepted, and here now tenders this, his bill of exceptions No. 5 thereto and asks that same be examined, approved, signed and filed as a part of the record in this cause.

The foregoing bill of exceptions is here now by me examined, approved, signed and ordered filed as a part of the record in this cause.

With this statement, explanation, and qualification by the Court, to-wit:

The State objected to the portion of the purported record which was excluded, among other reasons, because the same contained conclusions; and because "She" (referring to the only witness from the hospital by which said purported record was tendered) "is only the custodian; she did not prepare the thing; she was not there when it was prepared; she does not know whether it is correct or incorrect"; and the Court believing that the part excluded was hearsay and selfserving; and that a proper predicate had not been made for its introduction in evidence, excluded same.

[fol. 67] Without objection from either side the defendant testified fully as to the entry and exit of the bullet wound received by him. He pulled off his shirt and exhibited his body to the jury showing and testifying that the bullet wound received by him entered under his right arm and came out at or near the right of his backbone; and the defendant was not contradicted as to this testimony by him.

(Signed) A. R. Stout, Acting Judge of the Criminal District Court, Dallas Co., Texas.

[File endorsement omitted.]

IN CRIMINAL DISTRICT COURT OF DALLAS COUNTY

ADMINISTRATIVE ASSIGNMENT—Filed December 10, 1943

Whereas, it appearing that a necessity exists for the assignment of a District Judge to the Criminal District Court of Dallas County, Texas, by reason of the absence of the regular judge thereof; and,

Whereas, Judge A. R. Stout of the Fortieth Judicial District Court of Ellis County, Texas, has signified his willingness to be so assigned;

Now, Therefore, I, Claude M. McCallum, Presiding Judge of the First Administrative Judicial District of Texas, by virtue of the authority vested in me by law, do hereby transfer and assign Judge A. R. Stout, of the Fortieth Judicial District Court of Ellis County, Texas, to the Criminal District Court of Dallas County, Texas, Dallas, Texas, for the period beginning Monday, Dec. 13, 1944 A. D. for the trial of any cases that may come before him.

Done at Dallas, Texas, this the 10th day of Dec. A. D. 1943, 3:40 P. M.

(Signed) Claude M. McCallum, Presiding Judge,
First Administrative Judicial District of Texas.

[File endorsement omitted.]

[fol. 68] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 69-71] IN CRIMINAL DISTRICT COURT OF DALLAS COUNTY

[Title omitted]

Agreed Statement of Facts

Be it remembered that upon the trial of the above styled and numbered cause, the following are the facts, and all the facts, offered and admitted in evidence, to-wit:

TESTIMONY IN BEHALF OF THE STATE IN CHIEF

1

LIEUT. HUGH GILL, being sworn for the State, Testified:

I am Lieutenant Hugh Gill. I am a lieutenant in the United States Army. I am stationed at Camp Walters.

I am in the Cadet Aviation Forces. I was in Dallas on or about the 15th day of September, 1941. I was in the army at that time, but was on leave, or furlough. I recall being on a street car on that evening close to eight o'clock. It was on Commerce street going towards town. I do not know what direction it would be. Yes, sir, down this way, going west. I occupied a seat on the right hand side of the street-car the second seat from the front. I recall the stop of the street car on Commerce street at the intersection of St. Paul Street. The window was open in the immediate vicinity of me. There was quite a commotion there *there* on the street that attracted my attention. There were a number of people preparing to board the street-car at that intersection. When I looked out I saw a negro step in front of a white lady as she started to board the street-car. Then I saw a man standing by the side of this white lady, a white man, and he reached up and took hold of the negro and said "Wait a minute, boy." or, "Come back here, boy," or "Wait a minute, boy." That white man was a man I afterwards learned was V. L. Morris. I did not know him at that time. That, the defendant, is the person I saw step upon that street car and step in front of the white lady. That is the person I have since learned is L. C. Aiken. There are two steps on that street car. When I first saw the situation the lady had one foot on the—I could tell from the position of her body—she had one foot on the step and one on the ground, fixing to board the street-car. The negro came from over there, [fol. 72] on her left, and brushed on in front of her and started to go in the street-car himself. That white man that I later learned was V. L. Morris was standing to the left of the lady who I later learned to be Mrs. Morris. Yes, he took hold of the lady's body. When the negro came in contact with Mrs. Morris trying to get on the street-car, she didn't fall to the ground, but pushed backward off the step down there. I was sitting at that time next to the window looking right out, at the second window from the front. That would put them almost directly under my view. After the negro man stepped up and pushed, or kind of elbowed his way in, the party I later learned to be Mr. Morris reached up, caught his arm and said "Wait a minute, boy." When he did that the negro turned around. With reference to the street car *tract* the

negro had one foot on the step and turned backward and stepped down. When he stepped down I could see his hand; he had a knife in his hand. I don't know what type of a knife it was; it had a long blade and that is all I could see of it. When he turned around he had this knife in his right hand, and coming down and lunging at Mr. Morris with the pocket knife. He was on the first step of the street car. Mr. Morris was facing toward the entrance to *to* the street car. After the negro turned he had his face toward Mr. Morris. He turned on the step. Then I could see his right hand. What next took place when I saw him, the negro was lunging with the knife at Mr. Morris. Then the two were kind of scuffling, you might call it, kind of grappling there together. In the scuffling Mr. Morris was backing away from him, and the negro was lunging at him with the knife; every step he would take he would make a lunge. That was away from the street-car, towards the sidewalk. Just a second or two before the scuffling when the negro was lunging with the knife I saw a pistol—I did not know where the gun came from; but he appeared to be warding off that knife blade with the gun. He was doing just like that (indicating a waving motion.) The negro was lunging with that knife. That is right, Mr. Morris was going towards the street-car and the negro pressing on him. It was during part of that that I heard the shot fired. No, sir, I did not know at that time whether or not the shot took effect. The shot ended the struggle. Then [fol. 73] Mr. Morris turned towards the street car and the negro kept advancing on him with the knife. Part of that time they would be grappling, and then break and catch hold of each other's hands. No, I did not continue to sit there; after the first shot was fired I went to the front, standing in the doorway of the street-car. Some of the people that were out there at first trying to board the street-car staid on the street car and some disbursed in some way; I don't know how they disbursed. Yes, I went from the second seat of the street-car to the front of the street-car. By that time Mr. Morris and the negro were over pretty close to the curb. I don't know whether they were quite upon the curb, but right next to it; and right over there is where they fell. I heard another shot. That was about the time they fell. This all happened in rapid succession; it was a matter of split-seconds. When I heard the next shot I did not know then or now whether or not

that shot took effect. When I heard the next shot I stepped off of the street-car about that time. This second time the gun was in the negro's hand; I don't know how the second shot was fired, but in a split-second the gun was in the negor's hand and Mr. Morris had turned and started running toward the street-car. Then the negro took one step forward and pointed the gun and shot. Mr. Morris was just about stepping into the street-car when the third shot was fired. As Mr. Morris was about to step into the street-car the negro was over about the curb, some ten or twelve feet away. The negro took one step forward and pointed the gun this way (indicating, pointing it straight out.) Morris was shot in the back. When that shot was fired Mr. Morris fell into the street-car. He fell on his right side and rolled over. The negro started running; he was running North on St. Paul, towards Main street from Commerce street. After he turned the corner off of St. Paul street into Main Street and went to going East on Main Street,—there was a parking lot at the corner of St. Paul and Main Streets—and when the negro went around the corner I cut through the parking lot, and I gained enough on him and I made a lunge and caught him around the back and pinned his arms around his body. The negro then stooped over that way (indicating a bending forward movement.) on the curb, like this (indicating). [fol. 74] Then he pointed the pistol at me and said "I ought to kill you, too." Then I started going across the parking lot. At that time he was going East, towards the City Hall. No, sir, I did not go to the City Hall then. The last time I saw Mr. Morris he was lying in the front vestibule of the street-car. At that time I did not know Mr. Morris, nor his wife, nor the negro, nor anyone else pertaining to that. Yes, sir, they were all total strangers to me. That all took place in Dallas County and State of Texas, on or about the 15th day of September, 1941, at approximately eight o'clock that evening.

On Cross-examination by the Defendant he Testified:

I was in uniform at that time. I boarded the street-car out on Commerce Street; I do not know just the place; I was on my way from my Post Station and was going down to Louisiana Army Maneuvers. I don't know exactly what block I boarded it, but it was pretty far out. That is right,

I was on the street-car going West on Commerce Street. I was familiar with the City; I had lived here in Dallas. On this particular occasion I knew where the City Hall was; and I knew where the police department was in the City Hall then, in the basement of the City Hall. The City Hall is located between Commerce Street and Main Street along Harwood street. The City Hall is just one block on East of St. Paul Street. When the negro did the shooting he turned and ran one block North on St. Paul Street and then turned there on Main Street toward the City Hall. After I caught him and he gave me the slip I ran back into this parking station. I remained there just a few second, I don't know how long. The negro then walked on up the street toward the City Hall. I was at the City Hall a few minutes later. I did not see him there. I do not know whether he went to the City Hall or not. Oh, there were quite a few people there ready to get on the street-car. I don't know how many. I did not count them. There were somewhere six or eight or ten; might have been five; I don't know. There were both white and colored. There was one negro woman who boarded the street-car first. There was no one else that got on. What turned out to be Mrs. Morris was there ready to get on; and the defendant was getting on, too. From the position of Mrs. Morris' body I could see she was not suspended in the air; she was bound to be upon something, and she had one foot [fol. 75] on the ground. I do not know whether it was on the ground or up in the air ready to step on the street-car or not. The exit of the car is at the entrance; and there is a big door, split half in two on the left side of this exit, and there is a little swinging gate; and on this side, (the right hand side) you go in, which is the entrance. I do not remember whether there was anyone getting off the car at that time. Yes, a person could get on into the exit side by pushing that little door back. No, sir, I did not see the negro hand the conductor a transfer. I did not know the conductor. I am sure he was there at his post. When this man reached up and started to get hold of that negro, and told him to "come back here, boy," he reached with his left hand. He took hold of the negro somewhere on the arm. The first I saw of the commotion was the negro pushing over in front of Mrs. Morris—edging his way there. That was the first I saw there. No, sir, I do not know whether he had been pulled off before or not. The

street-car was not very crowded with passengers—overly crowded. There was not anybody standing up in the aisle; there were vacant seats. That is right, negroes as they boarded the car go back the entire length of the car, back to the negro compartment. I did not know a soul around there ready to board the street-car. Yes, I saw the gun in the negro's hand. I do not know what model gun it was; I did not have the gun in my hands and examine it. It was a revolver. It was bright. As well as I remember it had a bone handle; I will not say positively. No, I cannot tell the calibre; it was a mighty big gun. Yes, while I was up there on Main Street and that parking station I saw the gun there; it looked at that time about as big as this (indicating with his hands about two feet). The gun was pointing at me. No, he did not drop it there or anything. There did not anybody interfere to keep him from shooting me. No, he did not shoot me. At the time I caught him I do not remember of seeing anyone right out there when I caught him, or how close other people were. When the man took hold of the negro at the street-car he said "Wait a minute, boy." I do not remember just what I testified two years ago—not the exact words—but "Wait a minute, boy" or "Come back here, boy," about the same words; I can't remember exactly what I said two years ago. The character of that commotion that attracted [fol. 76] my attention first was the negro pushing in front of her. Yes, that was the first thing that attracted my attention—as the street-car stopped; I don't know whether it was right then or was it later; but I was sit-ing on the right side of the car, and as you look out—happened to be looking out of the window when it started. The first thing that attracted my attention was the negro pushing the white woman, forcing her aside, kinder. No, he did not strike her with his hands; he kind of elbowed, or pushed, her out of the way with his elbow. The negro had on some sort of dark clothes, I cannot say what they were, I don't know about his clothes; I don't remember. I don't remember whether he had on a hat or not. I don't remember whether he had a hat on or not as he went up the street and I followed him. The officer had on plain clothes. I think he had on a dark suit but I will not say positively. No, he didn't have on a policeman's cap. No, I did not see about his clothes anywhere a policeman's badge; I did not examine as to that; I was not that close to him. No,

I didn't see any. The first time I saw the pistol it was in the officer's hand. The first time it was fired, the first shot, it was still in his hand. No, sir, I never did see the negro actually strike him with the knife; all that I saw was the officer with the pistol, knocking the knife out of the way—trying to defend himself against the knife with the pistol. He hit the negro on the side of the head one time. The negro lunged at him two or three times when this occurred, when he was trying to defend himself from the knife is when he hit the negro over the head with the gun. I do not know which side of the negro's head he hit. I cannot say as to height how the two men compared. The officer was using the pistol with his left hand. No, I do not know whether he struck the negro on the right hand side of the head or not. When I had the negro pinned up there I do not remember seeing any blood on him other than on his clothes. It was on his shoulder and back. After that scuffling with him I had as much on me as he had on his clothes. I did not see any blood on the front, it was on the his shoulder and back. It was his right shoulder as well as I remember, and on the right side of his back. I did not know at the time that the negro had [fol. 77] been shot through the body. Yes, I saw some officers at the City Hall when I went up there. Yes, the negro had a gun when he started running. As far as I know no one touched that gun from that time up to the time I caught him except the negro. I don't know how fast he was running. I was running pretty fast, seemed like. I had to take th-ough that parking lot to catch him, cut him off. He was running about as fast as I was. I do not know whether when he left me there and went on down the street he continued to run or not; I was inside of the parking lot behind a post. I saw him walking on up Main Street. When I saw him he was about half stooped, and that would put him out of my sight, and I do not know, with him half stooped, whether he was walking or running. With him about half stooped I saw him going up Main street. I would not say how many seconds or minutes it was from the time I first heard that commotion and looked out the negro to the time he turned and went up St. Paul Street; I have not the slightest idea; things happened so fast I cannot estimate it. The whole thing was not over five minutes; the entire incident at the street car was not much over a minute, from the time the commotion

first started until he left. It was just like that (snapping his fingers) things happened. No, sir, I did not see the officer when he pulled the gun out of his belt. The negro and the officer were struggling and in the scuffling there some time prior the gun appeared in the officer's hand. I did not see it pointed directly at the negro; I don't know whether it was pointed at the negro. As to rememberin- that in testifying in Wexahachie that the officer pulled the gun—that I did not see the officer pull the gun out of his packet, but I saw the officer point it at the negro—pointing with the gun," the last few words of that statement I do not remember saying—I might have. I might have seen him. I do not remember at the present time of saying it. It is about twelve or fourteen feet from the steps of that street-car to the curb; it is not very wide. Yes, sir, the matter of the scuffling between the white man and the negro occurred in that space. That is right, it did not occur up and down Commerce street, but right across from the street-car.

[fol. 78] On redirect examination by the State he testified:

I remember seeing some one who I later learned to be Virgil Hughes. That pistol that I saw was of the general size, nature and description of this one you show me.

2

My name is Edwin Hall. I am a licensed physician. On the 15th of September, 1941, I had occasion to examine the body of V. L. Morris. That examination took place at the emergency room at Baylor Hospital. At that time I examined the body before Dr. Gault arrived there. I found marks of violance on the body of V. L. Morris. At that time he was dead. There was a penetrating wound about in this area, between the spinal column and immediately over the right shoulder blade, about midway between the upper angle of the shoulder blade and the lower. That was the point of entrance. There was not any point of exit. I have handled many bodies of live men, or dead, that have received pistol or gunshot wounds. In my professional experience that wound was a pistol wound. That showed that the pistol bullet did not come out. That wound that I have described was a fatal wound and caused the death of V. L. Morris. Yes, there were several vital

organs located in that area. Those heart area organs must have been pierced by the bullet going in that direction—the heart, the aorta, superior ventrical, lungs, esophagus and even the heart itself. That wound I have described and the course the bullet traversed through the area in which these vital organs are located. His mouth and nose were full of blood. From my experience it is my professional opinion that a tearing wound of the lungs would cause the blood that I saw in his nose and mouth. Yes, sir, it is my opinion based upon my own examination of this wound and what occurred, and that bullet in traversing its course through the body, that it had gone through the lungs, which caused the bleeding at the nose, ears and mouth. That was the fatal wound that I have testified to that caused his death. It was about 8:30 or 9 o'clock in the evening that I made this examination. At that time I did not know who he was, but later learned it was V. L. [fol. 79] Morris. The matters I have testified about occurred in Dallas, Dallas County, Texas, on the 15th day of September, 1941.

On cross-examination by the Defendant he testified:

I do not know in whose ambulance he was carried to the hospital. When I saw him at the hospital he was already dead. In examining the body he was already undressed, the upper part of the body. No, I do not know where that took place; he was already undressed when I saw him. He had on his clothes from his waist down, I did not undress that portion. From my examination I found no other wounds except the one I have described. There were no knife wounds or bruises on the body that I saw. Yes, that blood from the nose and mouth came from his lungs in all probability, and not from any wound inflicted over the nose or mouth. I took the direction of the shot that entered the body only as one could see from the outside; you could see pretty good. From that examination the course the bullet took on entering the body, it went forward, approximately going straight forward; you could not tell exactly without making a probe. This wound was right to the right of the spinal column, and between the spinal column and the shoulder blade.

3

R. B. THORNE, being sworn for the State, testified:

My name is R. B. Thorne. I am with the Police Department of the City of Dallas. I have been with the department twenty-three years. I was acting in that capacity on the 15th day of September, 1941. I had charge that night. On that night this defendant L. C. Akins, came to my desk there at the City Hall. (Witness was handed a pistol and examined it) That is the pistol he gave me. I did not examine the shells. There is a little oval opening in the front there, and he pushed the pistol through to me and says: "Here is the pistol a negro shot me with." At that time I noticed blood on him, on his head. The best I remember it was sort of on the left side of his forehead, along there, (indicating); looked like he had kind of brushed it off with his hand. That was the only evidence of blood that I saw. He was placed under arrest, and I turned the pistol over to Detective Tanner. That occurred here in Dallas, in Dallas County, Texas, on the 15th day [fol. 80] of September, 1941.

On cross-examination by the Defendant he testified:

The best I remember the blood was on the left side of his head. The best I remember he had on a hat at that time. No, sir. I do not know what he did with his hat. He was on the outside of the hall, to my left and on his right, and I walked out into the Detective Department and immediately I just turned him and the pistol over to Lieutenant Tanner and told Tanner the statement he had made to me in front. No, sir, I did not notice where he had been shot through the body. No, I did not notice w-as Detective Tanner did with him; I was busy; I don't know. No, sir, I don't know how many shells were exploded in that pistol. Yes, I knew Mr. Morris. When the negro came into the office and first called my attention he showed to be under quite a little strain. No, he was not under arrest at that time. No, he did not make any statement as to that; I did not have time—I did not ask him; he just came on around and met me sorter in the doorway of the Detective Department and we walked back there together. Yes, I know Mr. Morris was a member of the police force. The rules of the Police Department are that armed officers

should carry their pistols on an empty. They are very strict about that. This pistol here (The pistol identified as the one defendant had) has six chambers, and is what is called a double-action revolver.

4

MRS. V. L. MORRIS, being sworn for the State, testified:

My name is Mrs. Morris. I live here in Dallas. I am the widow of V. L. Morris who was a police officer. On the night of September 15th, 1941 I was with my husband. We had been to a picture show, and we were going home. My husband was dressed in civilian clothes. After we left the show we went to the corner of St. Paul and Commerce Streets to catch a street-car. The car was going west on Commerce Street. As the street-car approached the intersection of St. Paul and Commerce Streets there were others besides my husband and me there to board the street-car. As the car stopped there we started to get on and a negro woman went ahead of us and she stepped on ahead; and I was the next one. That street-car had one step going [fol. 81] down, making two steps going up. My husband was standing over by my left side. I was in front of him on the step to board the street-car, and he had hold of my arm. He was standing a little to my left side holding my arm, and I was preparing to step up on the street-car. I was catching the handhold getting on the street-car; I mean, made the first step, had my foot on it. Well, then there was a man—I didn't know where he came from; I had not seen him at any time; he bumped into me knocking me back—Yes, I had my foot practically on the step and holding to the handbar. And the negro came from this way (indicating from her right), between me and the street-car. Yes, as he did he contacted me right here (indicating her left breast.) I don't remember what portion of his body struck me when he struck me; it was under here (indicating left side or breast); some place on the left. As a result of his brushing into me, of course, I stepped back and my husband had hold of me; and he reached up and caught hold of the negro's arm, and says "Wait a minute, boy." Then he (defendant) jerked his arm back and jerked his knife. Well, I don't know what the officer was doing then; I was not watching; I went on to the next

step and in the street-car, and my husband did not follow me. Well, when he did not follow me I looked back, and when I did they were over by the curb, and the negro had out his knife and was hitting with it. My husband was backing back, and pulled his gun. Yes, I saw him when he pulled his gun. I never did see the shot. Well, I didn't see it; I was on the first, or lower, step, and I just turned around and standing holding to the street-car, and I did not look back. I heard three shots. It was the first shot I did not see. No, I could not see my husband and the negro after that first shot; after that everyone was screaming and holloing, and I just stayed there; and then the shots; I just did not want to pay any attention, it seemed like. I don't remember how many shots. Yes, the next I saw of my husband was when he fell in the car at my feet. He was just off the step when he fell. He said "Darling, he got me." Yes, I saw the negro again. When he shot he stepped back. I could not get to my husband on the steps on the outside. When I got to him I looked back and the negro was still standing there; and then I did not see him any more. Yes, I went with my husband to the hospital [fol. 82] in the ambulance. Well, I imagine—I think he was dead when we got there; he never said a word on the way. Yes, I think he was dead when we all reached the hospital. My husband and I had been married fifteen months. Yes, I know his pistol when I see it. This pistol (State's Exhibit No. 1) is my husband's pistol. That happened in the County of Dallas and State of Texas, on the 15th of September, 1941, about eight o'clock in the evening. The matters I have described all happened very quickly, but I will never forget it.

On cross-examination by the Defendant She Testified:

At that time I lived on Tenth Street in Oak Cliff. This street-car I was boarding was going West, going towards town. I do not remember which line that was; it was either Sunset or Happton Road, I do not remember which. Both of them use these long large cars, double at front, exit and entrance, and a swinging door for the exit side. The entrance is, of course, at the front, and the exit next to it, and as you approached the vestibule the exit would be to your left—as you faced in. Mr. Morris was left-handed, and he was at my left as we approached the street-car.

Yes, the first time I saw the defendant he was also at my left; but until he hit against me I didn't even see him. I did not see him until he hit me. At the time he hit me he was on the steps. I had already put my foot up; I was just stepping into the car when he hit me, almost ready to go up into the car. I was just in the motion of going up when he hit me. No, I do not know whether he came out of that exit door or from out on the street; I did not see him until he hit me. I do not know what portion of his body struck me or, came in contact with me; I do not know where he hit me; he just bursted flat into me; I don't know what portion of him came in contact with me. Yes, when he did that my husband reached up with his left hand and caught him by the arm, and says "Wait a minute, boy." I don't know whether he pulled him back or not; I just remember he reached for his arm. No, at that time the defendant did not come off the step and down on the pavement; he just jerked his arm and he just came right into me again. Then Mr. Morris caught hold of me, and pulled him back and said "Wait a minute, boy." Yes, he pulled him the second time. I don't know whether he pulled him off the steps at that time or not; and he just came right into me [fol. 83] again. I just heard him say "Wait a minute, boy", and the negro was not then in front of me, and I went on into the street-car. Mr. Morris might have jerked him off the steps twice; I know he said "Wait a minute, boy" or something like that equal. Then I stepped up on into the street-car. I do not remember about how many people there were there fixing to get on the car, but there were several people out there. I did not know any of them. No, sir, I did not know who the motorman was on that car —my husband must have, he spoke to him. Oh, yes, I saw him there in the vestibule when I got on. No, I did not see the defendant hand him a transfer. I did not see a transfer in the defendant's hand. No, I never noticed whether there was one or not. Yes, later on I saw the defendant over there by the curb with a pistol in his hand. Yes, that was my husband's pistol. My husband had carried it with him that afternoon when he and I came to town. Yes, he had it there at the vestibule of the street-car. He had it on his hip where he always carried it; it was not in a holster. No, he did not have on a policeman's uniform. Yes, he had a badge; always did. Well, I don't know just where he wore the badge; he either wore it or

carried it all the time. He had to have a badge. No, he did not have on a policeman's cap or hat, he was dressed. But he was going to work that night, and we had gone to the picture show, and we thought we would go back home to see if he could get a little sleep or not. He was about six-foot and weighed about 169 pounds. Yes, as a rule he had to carry his pistol, I was familiar with that pistol. I don't know about it also being a rule to make him carry it on an empty chamber. I never bothered with the gun. I do not know about the rule. Well, I don't know that he usually carried it on an empty chamber. I saw Mr. Morris when he first got his gun. I saw him then. He had his gun up like this (indicating in a striking position), and kept backing back. And he would flop his coat up trying to get the gun, and kept backing back, and when he got his pistol I saw him step back out of the way. No, I did not see him when he fired the shot. I did not see the defendant, when he, the defendant, fired the shot. No, I cannot give you any idea about how close together those shots were; they were something right along close.

[fol. 84] On Re-direct Examination by the State she Testified:

Yes, sir, I see the defendant sitting over there. Yes, he is the negro I am referring to that was there on the street-car, and with my husband's pistol.

EXHIBITS

The State introduced in evidence the pistol identified as being the pistol that defendant delivered to the police officer, and being also the pistol identified as belonging to J. V. Morris, as State's Exhibit No. 1.

The State also introduced in evidence as State's Exhibit No. 2 the five shells taken from said pistol, Exhibit No. 1, by the police officers to whom it was delivered, being three unexploded shell- and two exploded, or discharged shells.

The State Rests

TESTIMONY IN BEHALF OF THE DEFENDANT

5

MRS. NORA SMITH, being sworn for the Defendant, Testified:

My name is Nora Smith, I live in Dallas, I am Librarian at the Parkland Hospital, and have been for about seven

years. Parkland Hospital is a public hospital, operated under a State Charter, operated under the State and County together. As librarian I do have charge of the records of patients treated there in emergency cases. In the nature of these records I have a card on which is made the emergency report and I also have the X-ray made at the time, being the record of the treatment of a patient by the name of L. C. Akins on the evening of the 15th of September, 1941. This card is the card I had, of the doctor who saw the patient. Dr. Bowyer is the doctor who treated him. I think Dr. Bowyer is in the army now. I think he is not in Dallas.

DEFENDANT'S EXHIBIT NO. 1

The defendant next introduced in evidence that portion of said card that was admitted by the court, being Defendant's Exhibit No. 1, as follows, to-wit:

"Aken.

Emergency Service—Parkland Hospital. No. 63651. n. H. (This card will be filled out on every patient given Emergency care or Treatment.)

Time, 9:59 P. M., Date, 9-15-41 Fee ——.

Name, Akin L. C., Address 923 E. Tenth,

[fol. 85] Sex, M. Color—Col. Age,—Occupation—.

Here Before: In Hosp. Yes. In Dispens. Yes No. 1598. In Emerg. Yes. Condition good & Disch. to jail ward.

Treatment: MS. gr. 1/6 X-ray. Quendelenkey (?) 1000 cc 5%. Glucose. Disposition., jail Bowyer, House Staff MFR. /c Alone. Black & Clark."

6

OLLIE CONN being Sworn for the Defendant Testified:

I live at No. 723 Hollywood, Oak Cliff. I have lived in Dallas around thirty years. I am employed at the Fort Worth Ford Motor Company. I was in Dallas on or about September 15th, 1941. I was on a street-car on that date. The time it was was in the afternoon, well, I looked at my time card yesterday, September 15th, 1941 I punched out at 7:33. I caught a street-car immediately after that. I caught the Sunset car; it came west on Commerce Street. It crosses at the intersection of Commerce and St. Paul. Yes, I saw something unusual there that evening. Well, judging from the usual time it usually takes me to get

there, I would say I got to the intersection of Commerce and St. Paul Streets around eight o'clock. or possibly a little bit later. I was sitting near the center on the right hand side, of the street-car. Well, when the street-car stopped at the intersection of Commerce and St. Paul there was something that attracted my attention; a crowd of people out near the curb. Well, there was a white lady and two or three white men and a negro standing out there. That is all I noticed there. I can't hardly define what attracted by attention and caused me to look that way. There was something there that attracted my attention. Well, when I looked out there the negro was standing off I would judge three or four feet from them, looking over his shoulder at them—like that (indicating). He was three or four feet from the white man and white lady. When I first saw the negro he was just standing there. I can't say that I saw this white man make any movement. After they got to the street car I saw something; I heard a lick and a shot. I heard the lick first. Well, it was just an instant after I heard the lick before I heard the shot; I cannot be definite. It was a pretty hard lick. After I heard the lick and the shot I saw the gun. The white man had the gun when I first saw it. The white man I later [fol. 86] was told was Mr. Morris. When I first saw the gun he had it. When I first saw the gun it came up like this (indicating from towards his side belt), and in a minute he had it in his hand like this, (indicating his arm outstretched towards the front of him) That was before I heard the lick and the shot. When I saw him with the gun in his hand up like this (indicating up in a striking position) what happened was, this white lady had started straight across to the street-car, and this negro had started back in a wide circle of this white man, and he (the white man) started to follow with the gun, and as he started to follow him he pulled that gun like that (indicating). Like that street-car would be setting out there (indicating) and she went straight across and the negro made a circle and came back into the street-car. I would not say the negro was in front of the white man, at all. The gun came from back here somewhere (indicating about the belt of his trousers about the left hip). When I first saw it; and he pulled it like that (pointing towards the front.) When he had the gun in that position the negro was in front of him going to the street-car, and looked back over his shoulder at

that time. I did not hear the negro, say anything; No, sir, I didn't hear him say a word. After I heard the lick and the shot I heard two more shots. Well, after I heard these two shots I followed the negro to the City Hall. Well, the negro ran up St. Paul street and I jumped off the street-car and cut through a parking lot, and the negro passed up Main Street before I ran out of the parking lot; and I had run out, just as I ran out some fellow came by me in uniform, catching him. He did not hold the negro. Well, I don't know whether he stooped off the man's body, or whether he was a powerful negro, or not; but he (the negro) seemed to give him (man in uniform) a twist, and the fellow went over his (negro's) shoulder, and the gun went out of his hand and scooted across the sidewalk; and—I would call him a soldier—before the soldier could get the gun the negro had it again, and he had it like that pointing (towards the soldier), and that is the last I seen of the soldier. I never heard him say anything to him; I never heard the negro say a word. He was possibly as far from the soldier as from you to me (10 or 12 feet); and there was [fol. 87] a young white fellow run up then, and had one or two coca-cola bottles in his hand. After that the negro started on up the street to the City Hall. When the negro run into the basement of the City Hall, I run—I could not see the negro until I ran around the corner; and as I ran around the corner there was a policeman coming, and I says "Get him" or something. Yes, the policeman went ahead looking for the negro. When I found him he was sitting in a room in the police station. There were several policemen in there. Yes; I saw that gun again; a policeman had it. I do not know the policeman, I believe it was Lieutenant Spencer—it was the man I always thought was him. The negro had blood in the right side of his head, and I believe in front of his shirt. The blood on his head seemed to be coming down this way (indicating down the side of his head or face.) Well, I never noticed any back this way. This boy here (defendant) resembles the negro I saw up there. That has been a long time ago, and they all look alike to me.

On Cross-examination by the State, he Testified:-

I don't know, but I think this case was called in this court-room on two occasions before it was finally tried in

Waxahachie. No, sir, I did not appear here on either of those two occasions as a witness when it was called, twice in this court. Yes, when the case went to trial at Waxahachie was the first time I appeared as a witness. I did not go before the grand jury; I was not summoned No, I did not come to the District Attorney's office. At the time the negro ran down St. Paul Street and circled around on Main Street and this young soldier boy tackled him, when the negro recovered the *that* gun he done it that way (pointed it at the soldier.) Yes, he had the gun on the soldier. If he said "You G— D— son-of-a-bitch, I ought to kill you too" I did not hear it. I don't believe I was any farther away than to that clock (about 25 feet). I did not hear him say that. No. I never did see the officer shoot at any time. Yes, I contend that I heard three shots. The last shot the negro was not shooting up, he was shooting in the direction of the street-car, and the gun was angling up. That was the last shot I heard. Yes, sir, I saw whoever fired the second shot; I saw the negro fire it. Yes, sir I am positive I saw the negro fire the second shot. I did not see the officer then. Yes, sir, I did see the negro pointing [fol. 88] the gun towards the street-car when he fired the second shot. I was midway back in the street-car. I don't know how many seats were in front of where I was sitting; I judge six or seven. Yes, sir, I was back six or seven feet from the front. I could not see anything that happened or the trouble that occurred on the front steps of the street-car for those uprights and door jamb; I could not see in there. No, sir, if Mrs. Morris had her foot upon the step of the street-car in front, right on the step of the street-car, I could not have seen any of it. I do not know what went on before I noticed out there; something attracted my attention. Something unusual caught my attention; I do not know what it was. I could not see anything that went on down there on the steps. The first time I saw them they were out near the curb. Now the officer had that gun up, how he was doing with it, the first I seen he started off—I don't know whether he had the gun in his pocket or not; but it came up like that (indicating drawing it from near the belt by his side). And he carried it out that way (Indicating up and towards the front.) I saw the gun and he had the gun in his right hand.

On Re-direct Examination by the Defendant he Testified:

Yes, when the officer had the gun up like this (indicating) was the first time I saw the gun. I would not say the negro was in front of him; he was going, making that circle and looking back over his shoulder. And the officer was behind him with the gun coming up like this (indicating drawing it from his side or belt.)

On Re-cross Examination by the State he Testified:-

No, sir, I do not say to the jury that it came out of his right-hand pocket. The first time I seen the gun it came out like that (indicating, drawing it from right side towards the belt.), from his right side. No, sir, I did not also see the officer warding off the blows.

W. J. Bankston, being Sworn for the Defendant; Testified:-

My name is W. J. Bankston. I live at No. 328 West Page Street. I have lived there since the first of last April. I have lived in Dallas nineteen and a half years. I am employed with the Dallas Railway and Terminal Company. I was with the Dallas Railway and Terminal Com-
[fol. 89] pany on September 15th, 1941. My duties with that company was an operator of a street-car. I was operating over the Sunset line as far as Second, and then Hampton Road. My hours of work on that line were, I think, from near four o'clock up until twelve something; I began at four in the afternoon and got off between twelve and one that night. There was something unusual that occurred that night. It was at the intersection of St. Paul and Commerce streets. I stopped and opened the car door at St. Paul and Commerce streets. I think there were some twelve or fifteen people there waiting to board the car. No, I do not know how many whites and how many negroes were there; I did not observe that. There were some getting on the car. I do not know how that was as to who got on the car first—how it was they were getting on. I do not remember whether it was a white woman or a negro woman. What first attracted my attention was I heard some words outside of the car—argu-

ment—heated words; I was busy making change and transfers for passengers who were already in the vestibule. I did not at that time know who was participating in that argument. Yes, I knew Mr. V. L. Morris. Yes, he worked for the street-car company a number of years. All during the time I was trying to see what was going on, but I could not see who was involved on account of the people in the vestibule; but the first time I saw Mr. Morris to recognize him—the first time I knew anything about who was out there, for the people who were then in the vestibule—I looked out of the door briefly enough to recognize that it was him. I did not see the gun at that time. I did see the gun later. He was just holding it that way (indicating a striking position with his hand). I do not know what hand he had it in, but he had it up and going down this way (indicating a striking motion). I could not see whether there was anybody in front of him; I could only see him this way (indicating). Yes, when I first saw the gun he was striking at the negro man, this defendant here. Yes, I heard a shot fired; I heard that almost instantly after I saw the gun and recognized Mr. Morris. In fact, I heard the shot before I really saw him. That was the first time I heard the gun shot; and Mr. Morris had the gun in his hand. He was almost at the street-car steps, but he was still on the pavement. The first [fol. 90] time I saw the defendant was just an instant after the shot was fired. The street-car is like here (indicating) and Mr. Morris was back this way (indicating to the right of the car). He still had the gun, striking at the defendant. When I first saw the defendant he was going back from Mr. Morris, backing back toward the curb. No, I did not see anything in the defendant's hand. I did not see a knife; I never did see a knife. After that they backed clear to the curb, or sidewalk; at that time some one in the street-car holloed "Open this door back here", and a procession of passengers began crowding, and looking back in the car for a few seconds; and then I looked back again to the sidewalk, and the instant I looked back Mr. Morris started running towards the street-car. I did not get back in the car; I merely looked back there. Yes, I heard another gun-shot. I heard two distinctly; later on, I have no recollection of having heard a third shot. No, sir, I did not see any blood on this defendant anywhere; I did not observe him that closely. I saw the de-

fendant starting walking towards Main Street. It was just a fast walk. Yes, that was the last I saw of him.

On Cross-examination by the State he Testified:

Yes, a passenger who had gotten on up at Harwood street had given me a bill, I think it was a dollar bill he handed me, and he wanted change, and I was making change when I got to St. Paul Street, and he was still in the vestibule when we reached St. Paul Street. When we reached St. Paul Street there were some twelve or fifteen people out there at the place to board the street-car, and I opened the door and they began crowding on. Yes, my attention was directed to the different passengers, and checking them and making change. No, I did not see the starting of this difficulty. When I realized that there was a difficulty or commotion out there, then I attempted to look out to see what it was; The people were then in my view and I could not see. As they sort of widened out I looked around the people in the vestibule; and then was when I saw the man whom I recognized as Mr. Morris. I did not see him pull the gun, he already had it in his hand. They were up reasonably close to the street-car steps. Mr. Morris was not directly facing me; he was almost facing me. Yes, [fol. 91] he was almost facing the entrance to the street-car. At the time I saw the negro his back was towards me. He was in this position (indicating) and Mr. Morris was in this position (indicating facing towards each other.) Yes, I saw Mr. Morris with a gun in his hand. I could not observe whether it was in his right hand or left hand; but he was striking at him like that (indicating up and down.) The negro and Mr. Morris there in that intersection were apparently engaged in grappling with each other. They were grappling there and Mr. Morris was striking with that gun. No, sir, I could not see what the negro had in his hand. No, sir, I will not tell the jury he did not have a knife in his hand. Yes, after the struggle progressed there Mr. Morris retired toward the street-car. Yes, at all the time he was striking with his pistol, the negro was progressing towards him. No, sir, I did not see the first shot fired; I heard it. Well, the reason I could not see it was the people between me and them at the time; I could not see the negro. I could not see where the negro was. I saw only Mr. Morris at that time. Mr. Morris continued to retire back from the curb,

and at all times the negro was grappling with him. Yes, sir, I saw them when they were grappling over there at the curb. Yes, I think I heard three shots, but I was down there—I was giving attention to Mr. Morris. Yes, the last time I saw Mr. Morris and the negro together they were back there at the curb. Then when I looked again I looked straight out of my car door directly at them. Yes, they were both on their feet when I looked back—just at that instant I heard the shot. No, sir, I did not see the gun. Yes, I saw Mr. Morris start toward the street-car. Yes, he started in a run, he ran and jumped at last on the steps. I was standing at my control. When he started to run I got my hand on the control, thinking if the negro followed I would shut him out. At that time I saw the negro. The negro merely had the gun in his hand, something like this (indicating raised it up and pointed it straight out.) holding it when Mr. Morris left him, and then as Mr. Morris approached the car I didn't look at the negro; I looked down at the door. I just saw the negro with the gun in his hand and raise it up, and instantly I heard the shot. As I looked up the negro was going toward Main Street. Yes, from the time I first saw them out there, until they reached the curb, Mr. Morris was retiring and fighting the [fol. 92] blows off all the time. That shot was fired just as Mr. Morris was entering the door, and he fell right at my feet in the front vestibule. That was the shot that struck Mr. Morris and knocked him in the door. No, sir, I am not in a position to say whether I heard a third shot.

On Re-direct Examination by the Defendant he Testified.

When I saw Mr. Morris he was striking at the defendant, I think about twice. I never took particular notice whether he ever hit him; he just had the gun in his hand until they got to the curb; I saw him strike at him two or three times. No, sir, when I first saw the gun I did not see the negro. I do not know whether he had his back towards Morris or his face at that instant, before I could see him.

8

Roberta Akins, being sworn for the Defendant Testified:

My name is Roberta Akins. I live at 3121 Stacy Street. I am the wife of L. C. Akins. We have been married since

December 31, 1938. We were living together on the afternoon of September 15th, 1941, on East Tenth Street, Oak Cliff. He is twenty-eight years old now; I am twenty-seven. We have one child. I had known him about a year before we were married. He had never been convicted of a felony in this State or in any other State that I know of. At that time he was working out in Oak Lawn at a garage, I can't think of the name of the car place—anyway, it was a garage. Well, it was a garage.

9

J. F. DANIELS being sworn for the Defendant Testified:

My name is J. F. Daniels. I am Lieutenant of Detectives. I have held that position three years. I was Lieutenant of Detectives September 15th, 1941. I remember seeing Sergeant Thorne on that occasion. When I saw him it must have been around eight o'clock that afternoon, sometime. Yes, he gave me a gun. He never turned the defendant over to me, he just set him down by the desk by him, and said "this is the one that done the shooting." The pistol was like this one (shown him) State's Exhibit No. 1); nickel-plated and stag handle. I unloaded the gun. I took two empty shells that had been fired and three loaded ones out [fol. 93] of it: That is a total of five. This gun held six shells. Yes, it is a rule up there for the officers to carry one empty out of the six; the armed officers, all he can carry is an empty under the hammer of the gun all the time. That is a rule up there at the City Hall. Yes, sir, there was an empty chamber in this gun at the time I got it. Yes, I saw a little blood on him, a little blood on his head—I forget which side, but somewhere on his head; and a little blood on his shirt—just like they brought him from the hospital. I don't know who brought him into the jail. I did not see any other wounds or anything. No, I did not see a gun-shot wound or anything on the defendant's body. This boy first, I believe—I did hear him say he had been shot. I did not examine him; I don't know anything about that. They carried him on to the hospital.

On Cross-examination by the State he Testified:

I don't know how much blood was on his body; just a small bit on his head sort of smeared. I don't know whether it came from him rubbing his head or not.

10

V. S. SMART being absent in the army service, by stipulation of the attorneys for State and defendant his testimony on a former trial was read in evidence in behalf of the Defendant, as follows:

"My name is V. S. Smart. I am a City Detective of the Dallas Police Department; I work under Inspector Fritz. I was at the City Hall on the night of September 15, 1941, shortly after the killing of V. L. Morris. When I got there I received from Sergeant Thorne this pistol, with these shells in it. I made out a tag to attach to the pistol. I unloaded the pistol and took the pistol and shells into the property room, and put the shells in this envelope here, and got a receipt from the property room."

(The State again introduced said pistol and shells in evidence, being the same articles introduced as State's Exhibit No. 1 and Exhibit No. 2 heretofore offered in evidence.)

11

Defendant L. C. AKINS being Sworn in his own behalf Testified:

My name is L. C. Akins. I am the defendant in this case. [fol. 94] I am twenty-nine years old. I was twenty-nine years old this past August, of this year, I was born in Shreveport, Louisiana. I have lived in Dallas since the last of 1935. I am married. That is my wife who has just testified. My family consists of a wife and child. I have been in jail ever since the 15th of September, 1941. Up until that time I was porter at the General Van Winkle Motor Company. I had recently started there. At that time I lived at No. 923 East Tenth Street, Oak Cliff. The Van Winkle Motor Company is in the 4000 Block on Oak Lawn, I believe 4016. In going home from my work as I went down town I would catch the Oak Lawn car and when I reached town I would catch the Sunset car. My street-car from out there in Oak Lawn would come into the business part of town on St. Paul Street. I would get off the car at St. Paul and Commerce streets. It went down Commerce street at that time. The Oak Lawn car drove by and I got a transfer off the Oak Lawn car to the Sunset car, and the Sunset car was coming on at the corner of St. Paul and Commerce

streets. Outside of a colored lady there might have been other people standing there ready to board the car when I first went there, I didn't look. When the car stopped this colored lady was the first to get on the street-car; and she went in to where they went in there, and I was next to where they come out. I was standing there holding a transfer, and somebody came up behind me and snatched me out of the car and knocked me over the head and I looked around and he shot me. I was on the steps. He jerked me off the street-car only once that I remember. When the party jerked hold of me I was standing in the street-car door, up in the car. I did not see a white lady there at that time. I did not brush into her, no. No, sir, I did not know the man that pulled me off the car and struck me. I had never seen him before that day that I know of. No, I did not know at that time that he was a policeman. He did not say anything when he pulled me off the street-car. He hit me right here (indicating the upper part of the left side of his head.) It made a scar there. (Witness shows the scar to the jury.) That stroke was what caused that scar. Yes, sir, when he hit me there it produced blood, shed some blood. Well, my face was all covered with blood and my clothes, from that place. Yes, sir, it caused pain; it hurt me when he hit me. That is on the left side of my head. It is something like an [fol. 95] inch and a half below the crown of my head, on the left hand side, and about midway between the forehead and the back of the head. He struck me with a pistol. Yes, sir, I saw the pistol. I think he hit me with his left hand. I was coming down out of the car when he struck me with the pistol that made that scar. I had on my jacket, he caught hold of me between my shoulders, and the clothes. He caught me in the back of my shirt and suspenders together, and he snatched me. I had on my jacket. I would say he had turned me loose, I imagine when he struck me with the pistol. No, I was not then on the pavement, side of the street when he struck me. When he struck me as I was coming down out of the street-car with my transfer he threw his hand up, and as he hit me like that (indicating), he shot me. Then I jumped to grab him and the pistol, and the pistol went up in the air like that (pointing upward) and when I got the pistol I fired. I shot only one time. He shot only one time. I can't say in what position he was in when he fired. At the time I fired the pistol at him I was

hurting. Yes, my head was hurting where he had struck me. To me, it was very painful hurting. When he shot me I got the pistol and fired; what I did next, when I fired the gun I left the scene. I went up St. Paul Street to Main Street, and down Main to the City Hall. I did go to the City Hall. I started to go to the City Hall, and I did go to the City Hall. After I fired the shot I carried the pistol on there to the Desk Sergeant. I have learned his name since; I did not know it then. He is the officer who testified here yesterday, Sergeant Thorne. When I delivered the pistol to him he carried me over there to a room, and I sat and waited, and then they put me on the operating table over there, in the emergency hospital there in the City Hall. When they put me on that operating table some one pulled my shirt off and throwed it over there on the floor, and they kept me there for awhile until the ambulance came and carried me to the emregency hospital, the Parkland Emergency Hospital. Yes, sir, I was treated at the Parkland Emergency Hospital. I had on a kind of a light brown hat, a felt hat. I had that on when he struck me with the pistol. At the time the soldier tackled me on Main Street—just [fol. 96] before crossing the street going into the City Hall, I dropped it and I never did pick it up. When I was going on Main Street I was kind of trotting. As I was going up Main Street, had turned East on Main, I was going along. I did not know then there was anybody behind me, and all of a sudden like there was a man grabbed me, and I just kneeled down and he went over my head, and I went on to the City Hall. I was carrying the pistol down in front of me. When I flipped him over my shoulder I still had the pistol in my hand, and I went on down to the City Hall with it. (Witness was shown the pistol introduced in evidence as State's Exhibit No. 1) I would say it is the same pistol I turned over to Sergeant Thorne. Yes, sir, at the time I fired that pistol I thought my life was in danger. I had already been shot through and through the body and hit over the head. How I came to shoot, in a case like that a man don't know what is going to happen to him, and might do any thing. I shot to protect my own life. I did not have any grievance against this man; I had never seen him before. We had no other trouble before that. I had a knife in my pocket. No, sir, I did not draw it. I did not make any attempt to cut him with a knife. What became

of the knife, during the struggle I lost it. No, sir, I did not try to cut him.

(Witness removed his coat and exhibited the scars on his body that he claimed was made by the pistol shot. One under the right shoulder and coming out between the backbone and shoulder blade.) Yes, sir, that is where he shot me, entering here and coming out right between the backbone and shoulder blade. This, the entrance, is under my right arm. Yes, it came out near the back bone, right of the back bone. I don't know definitely what position I had my arm in at the time that shot was fired, but I had it up in the air, because if I had had my arm down he would not have hit me there. I am right handed. Well, before that difficulty, at the time that man caught me by the clothing and pulled me off, I was calm; after he did, during the difficulty, any one would be excited. I was just very much so. I was not raised in Shreveport; I was born there; I was raised partly in Houston, and in Belton. I have followed the busi- [fol. 97] ness of garage work nine or ten years, at different places. No, sir, I have never been convicted of a felony in this State nor in any other State.

On Cross-examination by the State he Testified:

I had not been back to Texas from California long before the time of this trouble. We came out there when we came back in September. Yes, sir, I tell these twelve men my best recollection about this whole trouble was, I had simply gotten into the vestibule of the street-car and was handing the motorman my transfer, and there had been no kind of trouble outside of the car, and for no reason on earth somebody grabbed me by the suspenders and jerked me off of the street-car and beat be over the head and shot me through and through. That is right, that is what I tell this jury. I know it did happen that way. Yes, sir, I tell the jury I did not even push against this young widow of officer Morris, who has testified here. If she was around when I got on the street-car I did not see her. I didn't see her within three or four feet of the street-car. I tell the jury that at the time the street-car pulled up and opened the door a colored lady entered on one side, and I was in the exit side. No, I did not crowd the colored lady that got on the car; I said got on the exit side. No, sir, when I got to the street-car I didn't even see Mrs. Morris around there. No,

sir, that is not what I say that after I had casually gotten on the street-car after the colored lady that somebody snatched me off of the street-car by my suspenders and struck me over the head and shot me through and through without saying a word. I tell these twelve men, as I told in the beginning, at the time he snatched me and hit me, coming down quite naturally, when snatched backward, as you come down you throw your hands up like that. (Indicating.) I don't know whether I had my right arm up or not when the shot was fired. I did not have the knife. I had a knife; I didn't have the knife in my right hand, no. I was between the curb and the street-car when I shot the officer. I don't know exactly how many feet I was from the street-car entrance, but I was not on the street-car and I was not on the curb. As the gun went up in the air in this position (pointing upward); I fired; I said I didn't know whether his back was towards me or not. At the time I shot him I tell the jury I was scuffling with him. If I took one [fol. 98] step and fired into that officer as he was running into the entrance of the street-car, I don't know it. No, I am not excited now. If I did take one step forward with my right foot and deliberately shoot that officer in the back when he was running from me, I don't know it I was in the scuffle, in that position like that, when I fired at him. I say I don't know whether when I fired that shot at that officer his face was this way (indicating away from the street-car) or turned toward the street-car. I don't know whether I was a foot or ten feet from him. I don't say how many feet I was from him; I said in the scuffle I fired; I do not know whether his back was to me or not. I was in the scuffle. I shot him because I was afraid he was going to kill me. I will not say it was an accident; and I will not say it was done purposely. I don't know whether I shot him dead center in the back, right between the backbone and the shoulder blade, or not. After I fired the gun I went down St. Paul Street. I fired once. I did not fire two shots as I know of. I don't know whether I took the gun like Mr. Conn said, and shoot up in the air or not. I say I don't know whether I did or not. When this young soldier undertook to stop me up there on Main Street. I did not lose the gun in that scuffle. No, sir, I did not lose that gun and go back and pick it up after the soldier tackled me and point it at the soldier; and I did not say to him "You God Damned son-of-a-bitch, I ought to kill you, too." Nobody mistreated

me at the City Hall; I was not given medical attention up there. I was taken over there to the emergency hospital part, but did not receive any kind of treatment. No, the officer up there did not grab me, and *and* ask me to sit down. I didn't say to the jury that he grabbed me; I said they taken me over into the emergency part, and they put me on the operating table. They pulled my shirt off and throwed it over in the corner, and laid me on the table; and then they took me to Parkland Hospital. They didn't put any bandages or anything on me at the City Hall. I was taken to the Parkland Hospital and my wounds were treated there; I don't know whether I was in good shape or not; I was sore and paining awfully. I didn't know that lady out there that night; I don't know wheth- I saw her out there that night. (Mrs. Morris was brought into the courtroom [fol. 99] for defendant to see.) I didn't know her. I don't know whether I saw that lady out there that night or not. Lieutenant Gill was brought into the courtroom for defendant to look at.) I can't verify it was this man I saw that night. I know some fellow grabbed me; I can't say that was him or some other fellow. I testified at Waxahachie I didn't even think that was the same man because I didn't know him and had never seen him before. I didn't take this pistol and point it at him and say "You son-of-a-bitch, I ought to kill you too." I didn't do that. I can't say and swear it was him; all I say is somebody came up behind me and grabbed me; I didn't know who it was, and don't know yet; I had never seen him before; and to swear that was the same person, I can't do it.

12

M. L. Miller being sworn for the Defendant Testified:

My name is M. L. Miller. I am an investigator for the District Attorney's Office, and have been since January 1st, 1940. I was an investigator for the District Attorney's Office in 1941. As investigator for the District Attorney's Office I did, with other officers at the City Hall investigate the case of L. C. Akins. That is right, I did make an investigation to get what evidence I could. In that investigation I did not get possession of the hat that belonged to the defendant, L. C. Akins. I have never seen it and never had it in my possession. I do not know where that hat is. I know it is not in the District Attorney's office. If it was I would know something about it, that is a fact.

On Cross-examination by the State he Testified:

I heard the defendant say that he had lost his hat in that scuffling up on Main Street. I heard him say that the night of the killing.

13

BEN WILSON BAIRD being sworn for the Defendant, Testified:

My name is Ben Wilson Baird. I live at 8110 McDonald Street. I have lived in Dallas County about twenty-four years. I work at the Tower Petroleum Building, and was working there September 15th, 1941. I do not remember [fol. 100] how long I have been working there; it had not been long; It was in May 1941, I believe, I started there at work. I got off of work at eight o'clock September 15th, 1941. Yes, sir, I had to punch a clock when I got off, and I punched that clock at eight o'clock. After I punched out I went into the dressing room and changed clothing and went out on St. Paul Street. After I got there I went South on St. Paul Street because my mother lives on the south side of Young Street. In going south on St. Paul Street towards Commerce Street I saw two men standing side by side, and as the street-car rolled up both of them stepped of- the curb it seemed to me—I could not tell— but the man on the left was white; about the colored boy I could not tell, then. Yes, I continued to walk that way. When they both stepped from the curb together the man that was on the left reached out with his left arm, and the one on the right he sidled off and stood there a moment. The colored man sidled off, and then he made an attempt to go toward the street-car; and the man on the left reached out with his right hand— he sidled away off that time. And then he made a third attempt to get to the street-car, and when he got to the car he stepped up in the car, and the man on the left, with his left hand hit or pulled him back. And there was a little parking station there on the left and a little stand right in the corner, and when I seen that pistol I jumped behind that little stand and I did not see any more. The man on the left pulled the pistol when I saw it; I am sure it was a white man. Then what happened, hit hit him back here— the white man hit the negro. I don't know what make of a gun that was; it was a shining like gun. After I saw the white man hit the negro back of the head with the gun I

jumped behind that building; I thought maybe he might shoot me. I heard two shots after I got behind the building; I did not know who done the shooting. Yes, it was a bright, shining gun something like that one you have. When I first saw the gun he had it in his hand looked like just that way (indicating). The defendant over there when I first saw him, was kinder leaning like that (indicating) on the steps; and the white man had the gun over to his head—just that way (indicating). No, sir, I did not know either of the parties then; I had never seen them before that I knew anything about.

[fol. 101] On Cross-examination by the State he Testified:

I am satisfied this case has had a little publicity in the papers. Yes, I know about you have attempted to try this case twice here in Dallas. I did not read the papers that you actually tried it in Waxahachie. This is the first time they got me in court. I was coming South on St. Paul Street. I just stepped up on the curb from Main Street into St. Paul Street when I first saw the colored man and the white men there at the curb. When I saw this transaction I was a block away; that is a block away from where the trouble happened. Yes, when I was on Main Street, a block away, the first thing I noticed a white man and a colored man leave the curb there on Commerce Street going part of the time towards the street-car. I don't know whether that same white man I saw there was the dead man, Morris. Yes, that is the same white man I saw scuffling with the negro. That is right, they started when they left the curb there to the street-car. No, sir, I never did see the colored man, this defendant here, get up in the street-car and hand a transfer to the motorman there, and the white man come from behind him and grab him off the street-car and hit him over the head and shoot him.

14

Howard Lary, being Sworn for the Defendant Testified:

My name is Howard Junius Lary. I live on Roberts Street, 3922, Dallas. I have lived in Dallas about twenty-two years. I work at the North American. I have worked at the North American one year the 14th of this month. Before I went to work for the North American I worked

for the Tower Petroleum Building. I was there at the Tower Petroleum Building about eight years. I was working for them on the 15th day of Septem[illegible], 1941. My hours at that date were we were off from six to eight. I was off at eight o'clock that day. I punched (a clock) out at eight o'clock. After I punched out I come on out making my way to go home. When I left the Tower Petroleum Building I went down St. Paul Street toward Commerce Street. Yes, sir, as I was going down St. Paul Street between Main Street and Commerce Street, I did see something that attracted my attention. As I was going down the street, [fol. 102] St. Paul Street, I saw some people standing there on the street curb at Commerce and St. Paul Streets. I didn't know exactly who they were. I had never seen them before. And as the street-car run up and stopped, this man that was there, he stepped off the curb as though he might catch the car; and as he stepped off the curb going to the car, this other fellow—this white fellow—pulled him back off the step; and he made the second attempt, and did the same the third time, and when he pulled him back the third time I seen him hit him with a gun. It seemed to me he hit him over the head with that gun. It was a shiney, nickel-plated looking gun; a shiney gun. Yes, it looked like this gun here, a shiney looking. He hit him over the head something like this, (indicating a striking movement.) The colored boy had his back like that, kind of towards the boy's side, like that (indicating), and hit him over the head with the gun, with a shiney gun. Well, after that they come into a tussle like; and after that I heard the gun fired. After I heard the gun fired I naturally tried to get out of the way to protect myself. I didn't know what might happen; you can't tell which way these bullets are going. At that particular time I heard the gun fired one time, and after that I heard it fired again; it fired twice. I did not see any thing in the negro's hand.

On Cross-examination by the State he Testified:

Yes, I was with my friend Ben Wilson Baird. I saw what he saw; we were both together. Yes, I saw this negro, this colored man and the white man there at the curb line of Commerce Street, and the colored man step off the curb first, and the white man by the side of him. And just as they stepped off the curb they stepped toward the car.

That is right before they got to the car that the white man grabbed the defendant, the colored man. Yes, he grabbed him one time, and then took another step or two and made another attempt; and the second time he pulled him back; and pulled him back the third time. Each time they were right at the street-car. No, I never saw the white man grab the negro twice before they ever got to the street car. No, sir, I was not day-dreaming out there. No, I never did [fol. 103] see this colored man come up into the street-car and hand a transfer to the motorman. No, sir, I did not see the white man stop around the car there and jerk for his pistol and strike him over the head and shoot him through and through. Yes, I was right there and saw the whole thing. Yes, I knew a jury has been selected twice to try this case I heard of it being tried in Waxahachie. Yes, this is the first time I have shown up on the scene.

On Re-direct Examination by the Defendant he Testified:

This is the first time I have been subpoenaed here; the first time that I am under process of the court, under subpoena, this time.

The Defendant Rests.

THE STATE IN REBUTTAL

15

JACK ARCHER, being Sworn for the State, Testified:

This is Jack Archer. I hold the position with the City of Dallas as City Detective, night bureau. I have been a city detective eleven years. On the evening of September 15, 1941, I was acting in that capacity of City Detective. Yes, sir, I recall the tragedy of Officer Morris being killed. I was just about two or three blocks of the City Hall at the time. No, sir, I was not a witness to the shooting or anything. No, I was not there when this defendant was in the detectives' office; I did not see him on that occasion; he was at the Parkland Emergency Hospital the first time I saw him. No, on that same evening I did not see that pistol that had been brought there to the City Hall. When I did see it I picked it up from the Property room to carry to Waxahachie at that trial. Yes, I brought the cartridges also, and the bullets. There were three unexploded shells and two ex-

ploded shells. Those cartridges were introduced in evidence on the trial at Waxahachie. They were left in the District Attorney's office at Waxahachie. Yes, I have made an effort to find them since the trial down there. Yes, anyway, there were two exploded and three unexploded shells; and that was the condition of it at the trial of this case at Waxahachie, Texas.

On Cross-examination by the Defendant he Testified:

I was called to the emergency hospital. I answered the [fol. 104] call and then went to the aid of Policeman Morris, and when I got there I learned he was carried away in an ambulance, and the next report he was dead. I saw Akins out there at the emergency hospital. He was shot. As well as I remember he was shot in the chest; I will not say about that. I did not see any wounds on his head. Just a few minutes after the call came in I was at the emergency hospital. Some uniformed officer was with the defendant when I got to the emergency hospital. I think the emergency doctor was there. He was treated at the emergency hospital; after the emergency treatment I don't know what. No, they had not already given any treatment before I got there; I was there in just a few minutes, not over five or seven minutes after I got the first call. We went right from the scene of the crime to the Parkland emergency hospital. No, sir, I never found a hat, or have a hat in connection with the trial of this case. No, sir, I do not know who found a hat. I do not know whether or not it was found.

Virgil M. Hughes being Sworn for the State Testified:

My name is Virgil M. Hughes. On the evening of the 15th of September, 1941, around eight o'clock I was working at that parking station, 1800 Commerce Street. That is the corner of St. Paul and Commerce Streets. Yes, I recall something unusual happening about that hour at the corner of St. Paul and Commerce Streets. I noticed a fight going on on the diagonal corner from me. I noticed two men scuffling there. I was talking over the 'phone at that time, and I hung up the telephone and grabbed a couple of soda water bottles and started out there. I had a pretty good idea what it was about, and when I got there—I was in about twenty feet when this first shot was fired, and the white man backed away from the negro. I could not

see whether the negro had anything in his hand or not. I could not say fighting, they were both scuffling together. The officer's hands were like this (indicating) and the negro's hands were like this (indicating). The officer was backing up. I saw the policeman backing off. The negro, after the [fol. 105] first shot, still kept coming on the white man, both along there, and the two got together again, and they were still fighting; and then I seen the negro stoop down and the white man ran toward the street-car, and as he turned to run the negro picked up this gun and he took deliberate aim and shot him in the back. Yes, I saw him do that. The officer fell right in the door of the car. Then this negro turned up St. Paul Street, toward Main Street, and when he got there he turned up Main Street, and he probably went fifty feet and a soldier, I believe his name is Gill, ran up behind him and grabbed him by the arms, and the negro just dumped him over on the sidewalk; I don't know how he did it, but just like that (indicating a body movement) he dumped him over, and he throwed this gun on him. I was on the street all the time following this negro, and he stopped. No, I could not hear anything the negro said when he drew the gun. Yes, he drew the gun on him. Then the negro went on up Main Street, and when he got about the middle of the block he commenced running from me; and when he started running there was a man on the corner there, on the same side of the street I was, and I grabbed him by the arm and I says "Let's catch him". And we went on and followed the negro down to the basement of the City Hall.

On Cross-examination by the Defendant he Testified:

Yes, I testified for the State in the trial of this case at Waxahachie, and I testified down there that I just heard two shots; I think there were three shots. I know I heard two shots. Yes, they were fighting pretty close together. And I never saw a knife in the negro's hands. Yes, sir, I went down the sidewalk after the negro; I went up St. Paul Street, and when he got to Main Street he went to the City Hall. Yes, sir, I followed him. Yes, after the soldier caught him and he flipped him over on the sidewalk, then he went on towards the City Hall; he left the scene. After he saw someone following him he picked up and went down there in the basement, as far as I could see, as fast as he could go. No, he did not have on a hat. I don't

know; I never did see him with a hat. As well as I remember he was bare-headed at that time. I don't know whether the officer was bareheaded or not. I saw the fighting; I do not [fol. 107] know when the officer put the bump on the negro's head. I didn't know there was a bump on the side of his head. As he went down to the City Hall he was about a half a block ahead of me. I don't know whether he went down in the City Hall or not. As far as I know I was by myself. Yes, I saw the defendant in there. He was at the desk. I believe there is where he was standing. I believe the gun was lying on the table, or desk or something. If I remember right it was a regular desk where the man makes his reports. It was a high desk, about like that (indicating the Judge's rostrum.)

17

DAN FERGUSON, being Sworn for the State, Testified:

My name is Dan Ferguson. I recall being on a street-car on the evening of September 15th, 1941 in the vicinity of St. Paul and Commerce Streets. I boarded the street-car at Commerce and Harwood streets. I was in company with my wife. As the street-car reached the intersection of St. Paul and Commerce Streets I was standing in the vestibule of the car. What caused me to be standing there, I was getting my change back from the street-car conductor. I had given him some bill and was still standing there. Yes, when the car stopped for other passengers to board it I was still standing there. As the car stopped and opened the door, there were several people there on the street preparing to enter the street-car. I heard a lot of commotion going on outside of the street-car. I could hear some cursing; I could not hear what the words were, but I could hear it. Yes, I turned to my right to see what was going on. When I turned and looked out of the door I saw a negro man lunging at a white man with a long knife in his hand. The negro man was one whom I afterwards learned to be L. C. Akins, the defendant over there. When I looked out of the door, here are the street-car steps, I was standing looking in this direction (towards the steps); that is correct. With reference to these steps the negro had one foot on the car steps and one foot down on the pavement. When I saw the officer, the man I afterwards learned to be Mr. Morris, he was standing back, that way (indicating back

from the steps.) When the negro had one foot here, on the [fol. 107] step, and one lower, he was lunging, like that, (striking forward), striking at Mr. Morris with a long bladed knife. He came down on the ground. At that time the white man did not have a pistol in his hand. Yes, I saw a pistol. At first he just had his hands up in front of him; then he had the pistol up, doing like this (indicating a waving motion.) The white man and negro continued scuffling. Yes, they moved away from the steps of the street-car backing towards the curb. The white man was backing. The negro was lunging at him all the time with the knife. Yes, about that time I heard a shot when they were scuffling. I was not able to see the shot. What prevented me from actually seeing the shot, they were close together in close grips. I heard the shot. After the first shot the scuffling continued. Yes, it continued and Mr. Morris was retreating towards the curb; Mr. Morris was going on towards the curb. The negro kept after him with a knife. I heard three shots. Yes, they got over right by the curb. When they got over by the curb they were in close grips; they were scuffling right on the curb when I saw the pistol fall on the pavement. Then I saw the negro pick the pistol up off the pavement, when I heard the second shot and then Mr. Morris turned around and ran back over toward the street-car. Mr. Morris ran back toward the street-car and the negro took a step forward and fired a shot at Mr. Morris. When the last shot was fired Mr. Morris had gone to step on the street-car. Yes, sir, he was actually boarding the street-car with one step on it. The negro was over there near the curb. Yes, sir, I saw the negro when he fired the last shot. He just took one step forward and fired that shot. When that last shot was fired, Morris fell right into the vestibule of that car, right at my feet. The negro turned up St. Paul Street towards Main Street. No sir, this entire matter was not drawn out; it all happened in a couple of minutes; about like this (snapping his fingers.)

On Cross-examination by the Defendant he Testified:

I live at 917 Cedar Hill. At that time I lived out on Waverly Drive. At the time I was waiting there to get my change Mrs. Ferguson was sitting back in the car. I did not notice just how many passengers were on it. I didn't notice whether there were any standing in the aisles or not.

[fol. 108] No, sir, I did not notice a negro woman get on the car right by me as I was standing there, I was making my change, getting it back from the conductor. A commotion was going on out there when I turned my head; that is what caused me to turn around. No, sir, I could not tell how the commotion started, I did not see that. When the negro was lunging and striking at the white man with the knife they were in very close grips. I could not tell whether the negro cut the white man or not; he was right at him, lunging at him with a knife; I could not tell whether he cut him or not. They went into a clinch. As they went into the clinch they were standing. It was during that time that I heard the first shot. Yes, I saw the white man when he hit the negro over the head with the pistol. They were right close up together then, and the white man was knocking him off as he came down and hit the negro; yes, hit him over the head. I couldn't tell which side of the head he hit the negro on, but I knew he hit him on the head. I saw only one pistol. As to what sort of a pistol it was, I don't know much about guns. I cannot say whether it was a blue steel or a bright pistol. I know it looked something like this one here (State's Exhibit No. 1). I knew it was a gun. I don't know whether it was an automatic or not. I did not see anyone else shoot but the negro; he shot the third shot. That was after seeing the white man with the pistol in his hand. The first time I saw the pistol it was in the white man's hand. Yes, it was the same pistol; I only saw one pistol. When the pistol fell to the pavement the negro got it off the pavement. Yes, I saw the negro get it off the pavement. That was after the first shot. No, I did not know whether the negro had been shot.

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J. W. Fritz being Sworn for the State Testified:

Yes, sir, this is Inspector Fritz. I have been with the Dallas Police Department since January, 1921. I started working on a beat, as a beat policeman, and worked myself up to various promotions, to Inspector of Detectives of the City of Dallas. That is the position I now hold. I was in that position on the 15th of September, 1941. Yes, sir, I recall the tragedy of Officer Morris being killed. I returned to the office shortly after it happened. When I got [fol. 109] to the office this pistol was there. It was turned

over to me. I believe it was by one of the officers, there were several in there, I believe it was by Mr. Smart, detective Smart. Yes, he also handed me some cartridges, three loaded cartridges and two empty shells. No, I would not know how many shells officer Morris had in his pistol at the time he was killed. We have that kind of a department rule that an officer was to carry five shells in the cylinder of his pistol; it was started to protect one from the old style pistol—it will not shoot when on an empty. We had that rule because if a man dropped his gun on a loaded cartridge it might shoot somebody in the hall or room; now, with the new style pistol it don't make any difference, because they won't shoot when a shell is under the hammer because they have a safety block. No, sir, this pistol (State's Exhibit No. 1) does not have a safety block; this is a .44 reinforced Smith & Wesson. No, it will not shoot when on an empty chamber, but it will shoot when the next loaded chamber comes around. Of course, that take it off of the empty chamber anyway. Yes, sir, I have my own pistol with me. (Witness takes out his pistol.) Yes, after I had examined that same pistol and those five cartridges I returned them to the officer and instructed them to put them in the property room. Yes, sir, those were the same shells, three loaded ones and two empty shells, that were introduced in evidence by the State of Texas at the trial at Waxahachie. I do not know how they got lost since that trial a year ago; we left them down there.

On Cross-examination by the Defendant he testified:

Yes, there were three loaded shells that had not been fired and two that had been. That was all I saw; if there were others there I don't know anything about that. Yes, the cylinder would hold six. I don't know how he carried his gun. We have a rule like that up there that a policeman must carry his gun on only five shells. Yes, we had a rule like that, but it was not enforced—— Yes, we have a rule like that, but I would have to explain; we have a rule up there so it will cover this gun I have described, a double-action gun. That rule was made at a time when it was dangerous to carry all six shells. That rule is still up there, but is unnecessary. Yes, I testified at Waxaha-
[fol. 110] chie on the trial of this case there. I testified they had such a rule. It has not been changed, but has

been released; no, not since the Waxahachie trial, but before that. One of those officers brought those five shells in to my desk; I believe it was Officer Smart; I don't know which officer. I can't say about the gun that it was the first time I had seen anything about it, but they brought the shells immediately into my office. I saw the defendant September 15th, 1941, when they came back from the Parkland Hospital, at the county jail; I didn't see him at the City Hall. He was on a cot when I saw him. I didn't walk any closer to him than to that table; I didn't make any examination; I didn't even talk to him; I talked to one of the other officers that had talked to him. Yes, when he was brought into the county jail he was on a cot.

On Re-direct Examination by the State he testified:

That rule to carry only five shells at all times is not enforced for the reason and because they have different kinds of guns; when they have safety blocks they carry six loaded shells, and will not shoot when anything should strike the hammer. Yes, I am Inspector of Detectives.

Both sides closed.

AGREEMENT OF COUNSEL

We, the attorneys for the State and the defendant L. C. Akins in the above styled and numbered cause hereby agree that the foregoing is a true and correct statement of the facts, and all the facts, offered and admitted in evidence upon the trial of this cause.

Dean Gauldin, Criminal District Attorney of Dallas County, Texas. Jimmie MacNicoll, Assistant Criminal District Attorney of Dallas County, Texas. Attorneys for the State of Texas. Doss Hardin, Noah Roark, Baskett & Parks, Attorneys for the Defendant Akins.

[fol. 111] The foregoing Agreed Statement of Facts is here now by me examined, approved, signed and ordered filed as a true and correct Statement of the Facts offered and admitted in evidence upon the trial of this cause.

A. R. Stout, Acting Judge for the Criminal District Court of Dallas County, Texas, presiding at the trial of said cause.

ORDER APPROVING STATEMENT OF FACTS

The foregoing prepared by Mr. Baskett from the court reporter's notes in question and answer and presented to the court on today (March 30, 1944) being correct, aside from typographical errors, which do not change the meaning any, is hereby approved with the following corrections which have been made initialed by the court, to-wit: Step for "tract" on page 2; dispersed for "disbursed" on page 3; "you God-damned-Son-of-a-bitch (added). I ought to kill you, too," on page 4; defend for "defendant" on page 6; from her right after (indicating) stricken on page 11; I for "he" on page 11; and V. L. for J. V. on page 14.

Witness my hand March 30, 1944.

Also submitted to and approved by Mr. Baskett.

A. R. Stout, Acting Judge for the Criminal District Court of Dallas County, Texas, presiding at the trial of said cause.

[fol. 112] Number 8723-A

THE STATE OF TEXAS

versus

L. C. AKINS

In the Criminal District Court of Dallas County, Texas

AGREED STATEMENT OF FACTS

Filed March 30, 1944.

Pearl Smith, Dist. Clerk, Dallas Co., Texas. E. W. Sturgis, Deputy.

[fols. 113-128] Brief for the Appellant omitted in printing.

[fol. 129] IN COURT OF CRIMINAL APPEALS OF TEXAS

No. 22,877

Appeal from Dallas County

L. C. AKINS, Appellant

v.

THE STATE OF TEXAS, Appellee

OPINION—June 21, 1944

The appeal comes from a death sentence on a charge of murder.

The case was before us on a former indictment and was reversed on a different question to those raised in the instant case. (See *Akens* v. *State*, 17 S. W. (2) 758). The first bill of exception complains of the refusal of the court to quash the indictment and abate the prosecution. The chief grounds to support this contention is that appellant is a negro; that there was no negro on the commission appointed by the court to select jurors and grand jurors for the time during which the indictment was returned. It is also complained that the grand jury did not consist of a sufficient number of negroes to give appellant that representation to which he was entitled, based on the percentage of the negro population among the qualified voters of Dallas County. Evidence in support of this motion as copied in the bill covers about thirty pages and will not be reviewed because we do not think that there was any discrimination shown. The grand jury was composed of eleven white men and one negro, who would have been in position to give evidence to sustain any complaint that a fair consideration was not given to appellant in the investigation which led to the indictment. Apparently the question has never been before this court in just the manner found in the present record and we will not enter into a discussion of the question which has no precedent in the opinions of any court so far as we can ascertain.

The second bill of exception contains an objection to being tried in the Criminal District Court before the Honorable A. R. Stout, Judge of the 40th Judicial District, [fol. 130] who had been transferred to said court. The question here raised has been decided adversely to appel-

lant's contention in Pearson v. State, 177 S. W. (2) 975, and Jones v. State, No. 22,689, not reported at this time.

Bill of Exception No. 4 complains of the refusal of the court to instruct the jury to return a verdict of not guilty. The court properly refused the request and the jury found the accused guilty and assessed the death penalty. There is evidence to show conclusively that appellant killed the deceased Morris; that he intentionally shot him with a pistol while they were engaged in an altercation; and that he did so with malice aforethought.

In connection with the foregoing, we will give a brief summary of the evidence. The deceased was a member of the city police force. While off duty and not in uniform, he and his wife had attended a show and as they were boarding a street car for home, appellant pushed in ahead of Mrs. Morris, shoving her back or to one side. The deceased caught him by the arm and requested him to wait. Instead, appellant attacked Morris with his knife, with the result that Morris drew his gun; struck appellant and shot him. In the scuffle between them, Morris lost his pistol and appellant grabbed it and shot Morris in the back as he was attempting to board the car. The wound was fatal. Appellant took the pistol and made his way to the city hall, where he surrendered and gave his version of what took place. As would be expected, a great number of witnesses, some on and some off the car, testified as to the things which occurred and there is not complete harmony between them. All of this went before the jury and no doubt was given full consideration by it. There is no serious conflict between the evidence of the prosecution and defense. The jury accepted the State's evidence as correct and, having done so, this court has no power to set aside the jury's finding.

[fol. 131] We have carefully considered the evidence in the case and while the extreme penalty might not have been assessed by other juries, as was the case in the first trial; yet the twelve men particularly selected in this case had the exclusive responsibility of fixing the penalty. They had the witnesses before them and had the privilege of judging their credibility and of the reasonableness of the things they detailed regarding the case. The trial court carefully conducted the case before the jury and nothing

is presented warranting a reversal of the case by this court.

The judgment of the trial court is affirmed.

Beauchamp, Judge.

(Delivered June 21, 1944.)

[fol. 132] IN THE COURT OF CRIMINAL APPEALS OF TEXAS

[Title omitted]

APPELLANT'S MOTION FOR REHEARING

Comes now the appellant in the above styled and numbered cause, L. C. Akins, and moves the Court to grant him a rehearing herein, and upon such rehearing to set aside the judgment of affirmance heretofore, on the 21st day of June, A. D. 1944, rendered herein, and to reverse the judgment of the trial court and remand this cause to the court below for another trial. If same is not dismissed on appellant's motion to quash the indictment herein. As his grounds therefore this appellant most respectfully submits to this Honorable Court that this Honorable Court committed error in the affirmance of said judgment as follows:

First:

This Court erred in holding that the record does not disclose any race discrimination in the selection of the grand jury panel from which the grand jury that returned the bill of indictment herein was selected; and erred, in holding, in effect, that the presence of one negro on the grand jury was sufficient to rebut the presumption or inference of discrimination.

Statement and Remarks:

This assignment of error is contained in appellant's Third Proposition in his Brief heretofore filed in this cause and this appellant here now refers to said Third Proposition together with the authorities cited and the Statement and Remarks subscribed to it. (See Brief, pages 10 to 12 inclusive.) This is also raised by Appellant's Bill of Exceptions No. 1 as contained in the Transcript of the Record in this cause.

[fol. 133] This court says in connection with this proposition: "The grand jury was composed of eleven white men and one negro, who would have been in a position to give evidence to sustain any complaint that a fair consideration was not given to appellant in the investigation which led to the indictment." In the first place we would not be permitted under the law to go into the matters transpiring before the grand jury in an investigation of that kind; and, (2) a fair or unfair consideration by the grand jury is not involved in the proposition. The discrimination consisted in the selection of the grand jury panel by the grand jury commissioners, about which each of the three grand jury commissioners testified in substance that after the judge swore them in as such, he told them that they must not discriminate against the negro race, and each swore that he had no intention of putting more than one negro on the panel; that he would not have put more than one on it. We again submit that that did not show a lack of discrimination, but on the contrary shows that the one negro was hand-picked for the purpose of evading the proposition of law and the manner of doing it and the spirit with which it was done constituted a discrimination against his race and color. The vice was in the organization of the grand jury, and not in the manner in which the case was investigated by the grand jury.

Second:

This court erred in holding, in effect: that Judge A. R. Stout of the 40th District Court could legally sit in trial of this cause in the Criminal District Court of Dallas County, Texas, by virtue of an assignment by the Presiding Judge of the First Administrative Judicial District of Texas, acting under and by virtue of the amendment to Section 5 of Article 200a of the Revised Civil Statutes of Texas, passed by the 48th Legislature; and that such amendment is not violative of Article V Section 28 of the Constitution of Texas. This matter appears by Appellant's Bill of Exceptions No. 2 in the Transcript of the Record and is briefed under Appellant's First Proposition in his Brief filed herein, on page 3 to 10 thereof.

[fol. 134] 3

Statement and Remarks:

The Court in this case has followed the Pierson case, which has been followed in the Pauline Brown case, the Horace Jones case and one other. In the Pierson case this Court held (1) that there is a vacancy in the office of judge of the Criminal District Court of Dallas County caused by the death of Judge Adams, which vacancy still exists; (2) that under the constitution no one but the Governor of the State can fill that vacancy until the next general election; (3) that Judge Stout, in his connection with that court did not fill that vacancy; (4), that in his connection with that court Judge Stout was neither the judge de jure nor the judge de facto; and (5), in effect, that the amendment to Section 5 of Article 200a of the Revised Civil Statutes of Texas passed by the 48th Legislature, was not intended, and did not have the effect, to provide for the filling of the vacancy caused by death etc., but was intended as a sort of artificial respiration to keep the court alive, keep it from dying, until the people could act at the next general election.

We earnestly submit that it was the purpose and intention of the Legislature, as expressed in the amendment itself, to provide for the filling of such vacancy caused by death, resignation or otherwise. By the second section of the amendatory bill, in declaring an emergency, it is specifically said "The fact that no clear provision of law exists at the present time to authorize the assignment of a District Judge *TO FILL A VACANCY IN CASE OF DEATH, RESIGNATION OR FOR OTHER REASONS* creates an emergency" etc. The Legislature had in mind the filling of a vacancy, it passed the act with reference to filling a vacancy, and the natural and reasonable consequenees of the act was to fill a vacancy. The language of the act is plain and does not require and "construction" to explain any ambiguity in it. Every act that Judge Stout performed in connection with the trial of this case, as well as in connection with any other case he may have acted in by virtue of said assignment, were acts that the regular judge would have done officially, if living. He was filling the place of the District Judge of that court. So we submit that the pur-
[fol. 135] pose of the amendment was "to fill a vacancy"

and the practical effects of its operation, and of the acts of the assigned judge, were "to fill a vacancy", and are violative of Article V, Section 28 of the Constitution of Texas.

In this connection this appellant refers the Court to his "Statement and Remarks" under his First Proposition in his original Brief filed herein, on pages 4 to 9 thereof, and specially adopts same as a part of his "Statement and Remarks" herein.

Third:

This Court erred in holding that the evidence adduced upon the trial of this cause was sufficient to support the verdict of the jury in assessing the death penalty against this defendant, and that same was sufficient to establish malice against this appellant.

Statement and Remarks:

The sufficiency of the evidence was raised first, in a motion for an instructed verdict presented to the court when the State rested her case in chief, as shown by his Bill of Exceptions No. 4 and in his amended motion for a new trial as contained in the Transcript of the Record herein. It is contained in this Appellant's Brief filed herein as his FIFTH PROPOSITION, which, together with the Authorities and Statement and Remarks are on pages 13 to 15 of his said Brief. We here adopt the authority there cited, Middleton vs. State, 179 S. W. (2nd) 510 on Rehearing, and the "Statement and Remarks" therein set forth as a portion of the Statement and Remarks under this portion of this motion, and refer this Court to same.

The testimony in this case shows that this appellant was pulled from the street car steps twice, welted over the head with a six-shooter, and shot entirely through the body, all by the deceased, before this appellant ever got hold of a gun to shoot; and that they were in a clinch when appellant got possession of the deceased's pistol, and when he got hold of the pistol deceased immediately ran towards the street car, and in the matter of a "split-second" appellant shot deceased. We submit that if appellant was not acting in his complete self-defense, then the shooting was upon an [fol. 136] adequate cause—both under the old murder law and the present murder law. It was no higher grade of offense, if an offense at all, than murder without malice.

Fourth:

Because this Court erred in holding, in effect, that this appellant was not, and is not, being deprived of his life without due process of law by virtue of being tried before Judge Stout of the 40th Judicial District under the assignment by Judge McCallum, Presiding Judge of the First Administrative Judicial District of Texas, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, and of Article 1, Section 19 of the Constitution of Texas.

Statement and Remarks

This matter is set forth in this appellant's Second Proposition in his Brief filed herein, on page 10 thereof. It raises a Federal question that was not passed on in the opinion of this Court affirming this case.

The foregoing Constitutional provisions, as well as the case of Scott vs. McNeal, 154 U. S. 34, 14 Sup. Ct. Reporter pages 1108 to 1112, are cited here in support of this proposition.

Fifth:

This Court erred in holding, in effect, that the trial court did not err in excluding from the evidence that portion of the Parkland Hospital records showing the date, nature and extent of the injuries received by appellant. This will more fully appear from the appellant's Bill of Exceptions No. 5 in the Transcript of the Record herein, and is contained in appellant's Brief under his Fourth Proposition, on pages 12 and 13 thereof.

Statement and Remarks:

This Court, in the opinion in this cause did not pass directly upon this issue. Appellant here now submits to the Court his "Statement and Remarks" under his Fourth Proposition in his original Brief herein.

In view of the fact that this appellant was the only witness who testified to the extent of his injuries and the nature thereof, this record from a public hospital, brought into [fols. 137-138] court by the proper custodian, was excluded by the court. In his explanation to the bill of exceptions the court says the defendant removed his shirt and showed the jury the places where the bullet entered and where it

went out, and that there was no controversy about it. This testimony came from a very interested witness. The jury might not have believed that the scars he exhibited were made at that time; nor that they were made at the same time; nor that they were bullet wounds; nor that they represented the entrance and exit of one wound. Defendant had a right to have this strongly corroborative testimony before the jury. Because it might have been cumulative is no reason for excluding it. The nature and extent of the injuries received by the appellant in the conflict that resulted in the death for which he was being prosecuted was exceedingly material to him. From the verdict of the jury it can reasonably be assumed that the jury did not believe anything testified to by appellant, the nature, cause and time of his injuries included.

Wherefore, premises considered, this appellant moves the court to grant him a rehearing herein, and upon such rehearing to set aside the judgment of affirmance rendered herein, and to either dismiss this prosecution, or remand this cause to the trial court for another trial herein, setting aside the judgment and verdict rendered herein in the trial court. For all of which he will ever pray.

Noah Roark, Gulf States Building, Dallas, Texas.
Doss Hardin, Texas Bank Building, Dallas, Texas;
Baskett & Parks, 416 Rio Grande Life Building,
Dallas, Texas; Attorneys for the Appellant.

[fol. 139] In Court of Criminal Appeals of Texas

[Title omitted]

Opinion On Motion for Rehearing—October 18, 1944

In his motion for rehearing appellant again asserts that there was discrimination against him because he belonged to the negro race, although there was a negro on the grand jury which returned the present indictment. He requests that we re-examine his brief on this point and his bill of exception number one in which is incorporated the evidence presented on the motion to quash the indictment. We have complied with his request but fail to find any evidence of discrimination. On the contrary, the evidence shows an effort on the part of the authorities to comply

with the holding of this court and of the Supreme Court of the United States upon the question of discrimination.

Appellant renews his complaint of being tried before the Judge of the 40th Judicial District who had been transferred to hold trial court. This complaint involves the very question decided adversely to appellant's contention in Pierson v. State, 177 S.W. (2d) 975. We refer to the opinion in that case for the reasons upon which were based the conclusion that appellant's position cannot be maintained. The Pierson case was followed in Fuller v. State, 180 S.W. (2d) 361; Jones v. State, 181 S.W. (2d) 75; Brown v. State, 181 S.W. (2d) 93.

The two points mentioned are those particularly stressed in appellant's motion. Other questions adverted to are not thought to call for discussion.

The motion for rehearing is overruled.

Hawkins, Presiding Judge.

(Delivered October 18, 1944.)

[fol. 140] In the Court of Criminal Appeals of Texas

[Title omitted]

Petition for Stay of Mandate

Petition of the Appellant above named, L. C. Akins, for an order staying the issuance of a mandate, and execution and enforcement of the judgment of this Honorable Court in this cause to enable said appellant to apply for and obtain a writ of certiorari from the Supreme Court of the United States:

To the Honorable F. L. Hawkins, the Presiding Judge of the Court of Criminal Appeals of Texas:

Your petitioner, L. C. Akins, appellant in this cause, respectfully presents this, his application for an order staying the issuance of a mandate in this cause, and moves the Court to enter an order withholding the mandate in this cause, and staying the issuance of a mandate herein, and says it is the bona fide intention of this appellant to make proper application to the Supreme Court of the United States for a writ of certiorari in this cause within the

next ninety days; and in support hereof he attaches the professional statement of his counsel, A. S. Baskett, of Dallas, Texas.

A. S. Baskett, Attorney for the Appellant, L. C. Akins.

I, A. S. Baskett, attorney for the appellant L. C. Akins, hereby certify that it is the bona fide intention of the appellant, L. C. Akins, to remove this cause to the Supreme Court of the United States by appeal or to make application to said Supreme Court for a writ of certiorari, or both, as he may be advised, and that I believe there is merit in his case and that the judgment of the Court of Criminal [fols. 141-142] Appeals of Texas ought to be reversed by the said Supreme Court of the United States.

A. S. Baskett, Attorney for the Appellant Akins.

[fol. 143] In the Court of Criminal Appeals of Texas

[Title omitted]

Order Granting Stay of Mandate

Upon consideration of the motion of the appellant L. C. Akins, for an order staying the mandate herein pending an application to the Supreme Court of the United States for a writ of certiorari, it is here now ordered that said motion be granted, and that the mandate in this cause be, and the same is hereby stayed until the Supreme Court of the United States passes upon said application of the appellant L. C. Akins for a writ of certiorari to be made to said Supreme Court on behalf of the appellant L. C. Akins, provided, however, that said application is filed in said Supreme Court within ninety days from and after this date.

This, the 18th day of October, A.D. 1944.

F. L. Hawkins, Presiding Judge of the Court of Criminal Appeals of Texas.

[fol. 144] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 145] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 26, 1945

The petition herein for a writ of certiorari to the Court of Criminal Appeals of the State of Texas is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 18 1945
CHARLES ELMORE CROPLEY
CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1944

Number 853

L. C. AKINS, *Petitioner,*

v.

THE STATE OF TEXAS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

A. S. BASKETT,
416 Rio Grande Life Bldg.,
Dallas 2, Texas.

and

W. J. DURHAM,
P. O. Box 641,
Dallas 4-E, Texas,
Attorneys for the Petitioner.

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In the

Supreme Court of the United States

OCTOBER TERM, 1944

Number.....

L. C. AKINS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States of America:

Your petitioner, L. C. Akins, respectfully submits his petition for a writ of certiorari to review the judgment and decree of the Court of Criminal Appeals of Texas in the above entitled cause, and for such petition says:

(1) That your petitioner is a citizen of the United States and a member of the African, or negro, race.

(2) That the Court of Criminal Appeals of Texas is the highest court, and the court of last resort, in criminal matters in Texas under the constitution and laws of the State of Texas.

(3) That during the January term, A. D. 1943, in the Criminal District Court of Dallas County, Texas, the grand jury in and for said court returned a bill of indictment into said court against your petitioner charging him with the offense of murder with malice of one V. L. Morris, alleged to have occurred in Dallas County, Texas, on the 15th day of September, A. D. 1941.

(4) That thereafter, on the 29th day of March, A. D. 1943, your petitioner was put to trial under said indictment in said Criminal District Court of Dallas County, Texas, and upon said trial was convicted of said offense and his punishment assessed at death.

(5) That thereupon he duly appealed from said judgment of conviction to the Court of Criminal Appeals of Texas, and said Court of Criminal Appeals thereafter, on the 21st day of June, A. D. 1944, duly affirmed said judgment of the trial court.

That thereafter this petitioner filed in said Court of Criminal Appeals his motion for a rehearing in this cause, which said motion was by said Court of Criminal Appeals in all things overruled on the 18th day of October, A. D. 1944. That thereby said judgment of conviction against this petitioner became final in so far as the courts of the State of Texas are concerned. This cause is reported in *Akins v. The State of Texas*, 182 Southwestern Reporter (2d series), page 723.

(6) That upon the trial of this cause in the trial court, as well as on appeal to said Court of Criminal Appeals of

Texas, two Federal questions were involved and in each instance decided against this petitioner, to-wit:

First

In the drawing of the grand jury panel from which the grand jury that returned the bill of indictment against this petitioner in this cause the jury commissioners discriminated against this petitioner, who is a negro and member of the African race, and discriminated against the negro or African race, on account of race and color, in violation of the Fourteenth Amendment to the Constitution of the United States, and he was thereby denied the equal protection of the law and denied due process of law in violation of said amendment to the Constitution of the United States.

Second

That this petitioner is being deprived of his life without due process of law for the reason that the duly elected, qualified and acting judge of the Criminal District Court of Dallas County, Texas, the Honorable Grover C. Adams, died on the 25th day of August, A. D. 1943, prior to the trial of this cause in said court, thereby causing a vacancy in the office of the judge of said court, and the Governor of Texas had not, at the time of the trial of this petitioner, filled said vacancy as provided by Article V, Section 28, of the Constitution of Texas, and no general election had intervened at which such vacancy in said office of the judge of said court could be filled; and at the time of the trial of your petitioner herein said vacancy in said office of judge of said court was still vacant by reason of the death

of Judge Adams. That Judge A. R. Stout, the judge of the 40th Judicial District of Ellis County, Texas, assumed to, and did preside over the said Criminal District Court of Dallas County, Texas, and over the trial of your petitioner in this cause, under and by virtue of an assignment by the Presiding Judge of the First Administrative Judicial District of Texas acting under an amendment to Section 5 of Article 200-a of the Revised Civil Statutes of Texas passed by the 48th Legislature of Texas, in 1943. Said amendment with reference to filling vacancies, or assigning other District Judges, to a District Court, in the event of a vacancy in the office of judge of a judge caused by death, is in direct conflict with Article V, Section 28 of the Constitution of the State of Texas, and is unconstitutional and void and conferred no authority on said Presiding Judge of the First Administrative Judicial District of Texas to assign the Judge of the 40th Judicial District of Texas to preside in said Criminal District Court of Dallas County, or to preside over the trial of this cause; and said Judge of the 40th Judicial District, Judge Stout, had no authority in law to so preside over the trial of this cause. He was neither a judge de facto or de jure of said Criminal District Court, and the proceedings so had in said Criminal District Court in this cause did not constitute due process of law.

(7) That upon the call of this cause for trial in said Criminal District Court, and before any announcement of ready for trial therein by this petitioner, your petitioner duly filed his motion in writing to quash the indictment herein because of discrimination against him and his race on account of race and color, in the selection of the grand

jury panel herein, and testimony was duly introduced thereunder, as will appear from this petitioner's Bill of Exceptions No. 1 as contained in the transcript of the record herein.

Said testimony discloses that by the United States Census of 1940 there were 336,851 white citizens of Dallas County, Texas, and 61,605 Negro citizens in Dallas County, Texas. That prior to the October Term, A. D. 1942, of the Criminal District Courts of Dallas County, Texas, no member of the Negro, or African, race had ever been a member of a Grand Jury in Dallas County. That after the reversal of the case of *Hill v. The State of Texas*, by this Court in June, A. D. 1942, one Negro was put on the Grand Jury for the October term, 1942, of said court, and one was put on the Grand Jury for the January, A. D, 1943, term of said Criminal District Court (the Grand Jury that returned the bill of indictment against your petitioner in this cause). That the Grand Jury Commissioners in selecting the Grand Jury panel from which said Grand Jury was chosen deliberately and intentionally limited the number of Negro citizens on said panel to one (1), and the name of that one so selected was intentionally and deliberately placed by them in such position on said panel of prospective Grand Jurors as to insure his serving. That thereby the Grand Jury that returned the bill of indictment in this cause against this petitioner was selected in such a manner that it discriminated against this petitioner and his race on account of race and color. That all other members of the Negro or African race except that one were intentionally and deliberately excluded from serving on said Grand Jury.

That such selection of said Grand Jury was an evasion of petitioner's rights under the Fourteenth Amendment to the Federal Constitution, and the same was an artful, as well as a tactful, evasion of the Constitutional rights of this petitioner, that there is a large number of Negroes qualified for Grand Jury service in Dallas County, Texas. Testimony was taken on behalf of said motion, which is contained in this petitioner's Bill of Exceptions No. 1 as contained in the Transcript of the Record herein. Said motion was overruled and exception noted.

(8) That upon the call of this cause for trial in the Criminal District Court of Dallas County, Texas, this petitioner, in limine, and before an announcement of ready herein by the petitioner, and before a plea was entered, duly filed herein and presented to the court his objections in writing to the trial of said cause before or in the Criminal District Court of Dallas County, Texas, and before the Honorable A. R. Stout, the District Judge for the 40th Judicial District of Texas in and for Ellis County, Texas, and for any proceedings of any character whatsoever in said court and before said Judge of the 40th Judicial District of Texas, because the regularly and duly elected, qualified and acting judge of said court, Judge Grover C. Adams, had theretofore died, thereby causing a vacancy in the office of judge of said Criminal District Court of Dallas County, Texas; that the Governor of Texas had not appointed the Honorable A. R. Stout or any one else to fill said vacancy and there had been no general election since the death of Judge Grover C. Adams in which the Honorable A. R. Stout had been elected to fill said vacancy; and

that the said A. R. Stout was assuming to act by virtue of an assignment thereto by the Presiding Judge of the First Administrative Judicial District of Texas under and by virtue of an amendment to Article 200-a, Section 5, of the Revised Civil Statutes of Texas. That said amendment is unconstitutional and void, and said assignment conferred no legal authority on the said A. R. Stout to preside over said Criminal District Court or the trial of this cause, and that by virtue of such trial at this time before said Judge A. R. Stout this petitioner would be denied a trial according to due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Upon the presentation of said objections the facts of the death of the judge of said Court, Judge Adams; that the Governor of Texas had not appointed a judge to fill the vacancy caused by the death of Judge Adams; and that Judge A. R. Stout, Judge of the 40th Judicial District Court of Ellis County, Texas, is assuming to act herein by virtue of an assignment by the Presiding Judge of the First Administrative Judicial District of Texas, and not by virtue of any appointment by the Governor of the State of Texas, were duly stipulated into the record as will appear from this petitioner's Bill of Exceptions No. 2 as contained in the Transcript of the Record in this cause.

Your petitioner submits herewith his Briefs under this Petition for a writ of certiorari, and a certified copy of the Transcript of the Record had in this cause in the Court of Criminal Appeals of Texas.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(1) The decision of the Court of Criminal Appeals of Texas involves two important questions of Federal Law and of the Constitution of the United States.

(2) The decision of the Court of Criminal Appeals of the State of Texas herein was and is contrary to the numerous decisions of this court in applicable cases.

(3) The decision of the Court of Criminal Appeals of the State of Texas herein was such that the guaranties of equal protection of law to petitioner as provided by the Constitution were denied.

(4) The decision of the Court of Criminal Appeals was such as to deprive the Petitioner of life without due process of law in violation of the Constitution of the United States.

(5) The decision of the Court of Criminal Appeals of Texas herein involves an important question of Federal procedure, and so far departs from the usual course of procedure as to bring this case within the rule for review by this Honorable Court.

WHEREFORE, for the reasons stated, your Petitioner, L. C. Akins, respectfully prays that this court, by a writ of certiorari issued under the seal of this court, directed to the Judges of the Court of Criminal Appeals of the State of Texas, command and direct said Court of Criminal Appeals of Texas to certify to this court a full and complete transcript of the record had in this cause to the end that

same may be reviewed and determined by this court as provided by law, and that the judgment and sentence of the Criminal District Court of Dallas County, Texas, and the decision of the Court of Criminal Appeals of the State of Texas, be in all things reversed, and for such other and further relief to which your petitioner may be entitled.

PETITIONER FURTHER RESPECTFULLY PRAYS THE COURT that it issue its most gracious order directed to the Court of Criminal Appeals of the State of Texas commanding said court to stay further proceedings herein until this petition has been considered and determined by the court.

L C Akins
Petitioner.

UNITED STATES OF AMERICA
STATE OF TEXAS } ss.
COUNTY OF DALLAS.

I, L. C. Akins, being duly sworn depose and say that I am the petitioner in the above entitled cause; that I have read the foregoing petition, and that the same is true as I verily believe.

L C Akins

Subscribed and sworn to before me by the petitioner, L. C. Akins, on this, the 12th day of January, A. D. 1945.

A. S. Baskett

Notary Public in and for Dallas County, Texas.

A. S. Baskett

A. S. BASKETT,
416 Rio Grande Life Bldg.,
Dallas 2, Texas,

and

W. J. Durham

W. J. DURHAM,
P. O. Box 641,
Dallas 4-E, Texas,
Attorneys for the Petitioner.

We, A. S. Baskett and W. J. Durham, attorneys and counsellors at law, admitted to practice in the Supreme Court of the United States, hereby certify that we prepared the foregoing petition for a writ of certiorari and know the contents thereof; that the same is not made for the purpose of delay; and that in our opinion said petition is meritorious and well founded in law, and ought to be granted and the writ issued.

A. S. Baskett

A. S. BASKETT.

W. J. Durham

W. J. DURHAM.

In the

Supreme Court of the United States

OCTOBER TERM, 1944

Number.....

L. C. AKINS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

The Respondent herein is hereby notified that the Petitioner will, on the 22nd day of January, A. D. 1945, upon the convening of court on that date, or as soon thereafter as the court will receive same, submit to the Supreme Court of the United States this Petitioner's motion and petition for a writ of certiorari in this cause, copies of said petition and of this Petitioner's Briefs under said petition are herewith submitted to you, said petition to be submitted to said Supreme Court at its courtroom at the Capitol, in the City of Washington, D. C.

A. S. BASKETT,
416 Rio Grande Life Bldg.,
Dallas 2, Texas.

and

W. J. DURHAM,
P. O. Box 641,
Dallas 4-E, Texas,
Attorneys for the Petitioner.

The foregoing notice is hereby accepted and a deliver
of a copy thereof, together with a copy of said petition fo
certiorari and petitioner's Brief under said petition, ar
hereby acknowledged.

Attorney General of Texas.

State's Attorney with the Court o
Criminal Appeals of Texas,
Attorneys for the Respondent.

FILE COPY

Office - Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1944

Number 853

L. C. AKINS, *Petitioner,*

v.

THE STATE OF TEXAS, *Respondent.*

BRIEF OF PETITIONER UNDER HIS PETITION FOR A WRIT OF CERTIORARI

A. S. BASKETT,
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Dallas 2, Texas.

and

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WARLICK LAW PRINTING CO., INC.—*Law Brief Printing*—Dallas, Texas—Central-4091

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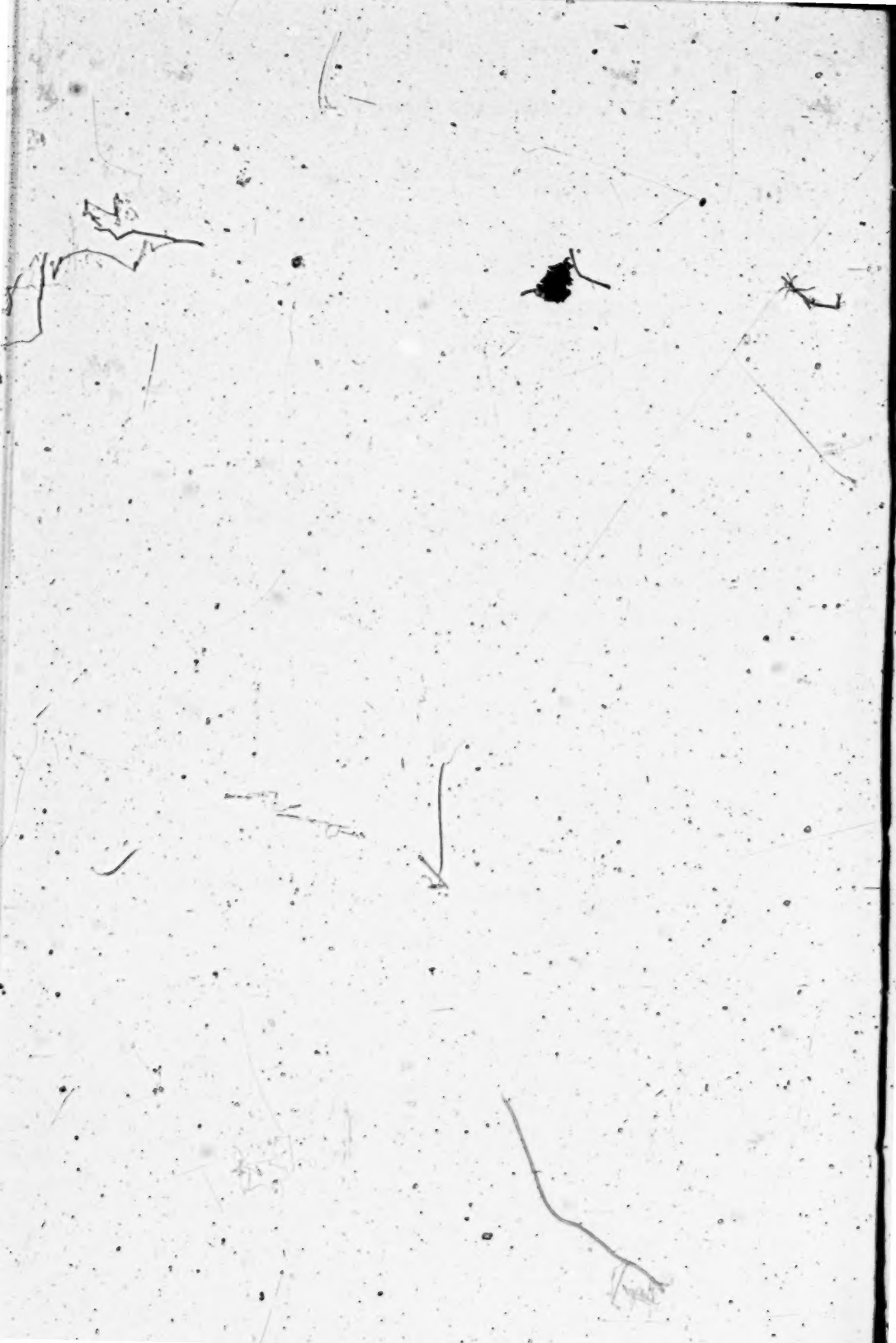

In the

Supreme Court of the United States

OCTOBER TERM, 1944

Number.....

L. C. AKINS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

BRIEF OF PETITIONER IN SUPPORT OF HIS APPLICATION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

STATEMENT OF THE CASE

Petitioner, L. C. Akins, an American citizen and a negro, was charged by indictment in the Criminal District Court of Dallas County, Texas, with the offense of murder. Prior to his trial he seasonably filed his motion to quash the indictment on the grounds that he had been denied due process of law, and equal protection of the law under the Fourteenth Amendment, Section 1, of the Constitution of the United States, by virtue of the fact that the Grand Jury that returned the indictment against this petitioner was selected in such a manner that discriminated against this petitioner and against the negro race;

that the Grand Jury Commissioners that selected the grand jury panel from which the grand jury was selected that returned the indictment against this petitioner intentionally discriminated against the negro race in that said Grand Jury Commissioners deliberately and intentionally limited the number of citizens of the negro race to one (1) that they would consider or permit to serve on said grand jury, and the name of the one member of the negro race selected on said grand jury panel from which said grand jury was selected was intentionally and deliberately placed on such panel in such position as to insure his serving on said grand jury, but, all other members of the negro race were intentionally and deliberately excluded from serving on said grand jury; that said manner of selecting said grand jury in fact discriminated against your petitioner and his race on account of his race and color; that such selection of said grand jury was an evasion of Petitioner's rights under the Fourteenth Amendment to the Federal Constitution, and the same was an artful, as well as tactful, evasion of the constitutional rights of this Petitioner, That there was a large number of negroes and members of the negro race who had paid their poll tax, qualified to vote, able to read and write, and qualified to serve on the grand jury in said County and in said court.

In support of said motion to quash the indictment testimony was taken before the Court, which adduced the fact that the Grand Jury Commissioners who selected the Grand Jury panel from which the Grand Jury that returned the indictment in this case was selected that indicted the Petitioner intentionally discriminated against

the Negro race in that said Grand Jury Commissioners deliberately and intentionally limited the number of Negro citizens to one (1) that they would consider or permit to serve on said Grand Jury. (This will appear fully from this Petitioner's Bill of Exceptions No. 1 as contained in the Transcript of the Record in this cause.) That thereupon the Court overruled said motion and defendant therein duly reserved his exceptions to said ruling.

That the regularly and duly elected, qualified and acting judge of said Criminal District Court, Judge Grover C. Adams, had theretofore died, thereby causing a vacancy in the office of the judge of said court, and the Governor of Texas not having filled said vacancy and no general election having intervened at which said vacancy had been filled, the Honorable A. R. Stout, the Judge of the 40th Judicial Court in and for Ellis County, Texas, appeared by virtue of an assignment by the Presiding Judge of the First Administrative Judicial District of Texas, and assumed to preside over and hold court for said Criminal District Court of Dallas County, Texas, and to preside over the trial of your Petitioner in this cause in said court. That upon the call of this cause, and before any announcement of ready had been had or any plea taken herein, your petitioner, in limine, filed and presented to said judge his objections to being tried in said Court at said time and before said Judge A. R. Stout, so assuming to preside therein, because of said vacancy in said office of judge of said court, and because the Presiding Judge of the First Administrative Judicial District of Texas had no legal authority to assign said judge to preside in the event

of a vacancy in the office of the judge of said court caused by the death of the judge thereof. Said objections were in writing and duly presented to said Judge A. R. Stout, so assuming to preside. That upon a hearing thereof it was duly stipulated in the record the facts of said death, said vacancy and the assignment of Judge A. R. Stout as aforesaid to preside in said Criminal District Court. Said objections were duly overruled by the acting judge and this Petitioner. These matters will appear from this Petitioner's Bill of Exceptions No. 2 as contained in the Transcript of the Record in this cause.

That thereupon the case was tried to a jury which resulted in the conviction of Petitioner with the penalty assessed at death. The cause was duly appealed to the Court of Criminal Appeals of Texas, which court affirmed the judgment of the court below, and Petitioner duly filed his motion for rehearing, which was overruled. Said judgment of affirmance and overruling said motion for rehearing are contained in the Transcript of the Record in this cause.

POINTS INVOLVED

First

The judgment of the Court of Criminal Appeals of Texas in affirming the judgment of the Criminal District Court of Dallas County, Texas, in this cause, and in overruling this Petitioner's motion to quash the indictment in this cause was and is contrary to Section 1 of the Fourteenth Amendment of the Constitution of the United States of America and violated the rights of this Petitioner under

said amendment in that in the formation of the Grand Jury that returned the bill of indictment herein there was discrimination against the Petitioner and the members of the Negro or African race on account of race and color and this Petitioner was thereby denied the equal protection of the law, guaranteed him under said amendment to the Constitution of the United States.

Second

Said judgment of the Court of Criminal Appeals of the State of Texas in affirming the judgment of the Criminal District Court of Dallas County, Texas in this cause in overruling this Petitioner's motion to quash the indictment herein on account of racial discrimination against him and his race, deprives this Petitioner of his life without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and in violation of the Fifth Amendment to said Constitution of the United States.

Third

The Honorable A. R. Stout, the Judge of the Fortieth Judicial District of Texas, in and for Ellis County, Texas, having no authority in law to preside as the judge of the Criminal District Court of Dallas County, Texas, in the trial of this cause, said trial and judgment rendered thereunder is a nullity, and the judgment of the Court of Criminal Appeals of Texas in affirming said purported judgment, and said purported judgment, do not constitute due process of law and thereby this Petitioner is being de-

prived of his life without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of the Fifth Amendment to the Constitution of the United States.

Authorities under the First and Second Points

Constitution of the United States, Fourteenth Amendment, Section 1;

Constitution of the United States, Fifth Amendment;

Hill vs. Texas, 316 U. S. 400, 62 Sup. Court Rep. 1048;

Akins vs. State (Texas), 167 S. W. Rep. (2nd Series) 758;

Pierre vs. Louisiana, 306 U. S. 370, 59 Sup. Ct. Rep. 536;

Neal vs. Delaware, 103 U. S. 370;

United States Ex Rel Jackson et al. vs. Brady, Warden, 133 Fed. (2nd) 476;

Norris vs. Alabama, 294 U. S. 598, 55 Sup. Ct. Rep. 579;

Lane vs. Wilson, 307 U. S. 368, 50 Sup. Ct. Rep. 872;

Guinn et al. vs. U. S., 238 U. S. 347, 55 Sup. Ct. Rep. 926;

Myers vs. Anderson, 238 U. S. 368, 55 Sup. Ct. Rep. 932;

Carter vs. Texas, 177 U. S. 442, 20 Sup. Ct. Rep. 687;

Martin vs. Texas, 200 U. S. 316, 26 Sup. Ct. Rep. 338;

Smith vs. State (Texas), 77 S. W. Rep. 453.

Statement and Remarks

Upon the hearing of the motion to quash the indictment herein the testimony adduced, as shown by your Petitioner's

Bill of Exceptions No. 1 in the Transcript of the Record herein, the 1940 United States Census showed that the population of Dallas County, Texas, consisted of 336,851 white population and 61,605 negro population. That prior to the October, 1942 term of the Criminal District Courts of Dallas County there had never been a member of the Negro or African race on a grand jury in Dallas County, Texas. That after this Court reversed the case of *Hill vs. Texas*, in June 1942 one negro was put on the grand jury for the October, 1942, term, and one put on the January, 1943 term, it being the grand jury that returned the bill of indictment against your Petitioner in this cause. That the Grand Jury Commission that selected the grand jury panel for said January, 1943, term of said court consisted of three men, to-wit:—W. H. Wells, Roy E. Douglas and Ernest R. Tennant, all of whom testified on said hearing. They were selected as such commissioners by Judge Grover C. Adams. W. H. Wells testified "We were advised by Judge Grover Adams that the Supreme Court had ruled that we could not discriminate against any one because of his color, if I recall, they had not been discriminating for selection of the grand jury panel; and in turn they said there were sixteen, and it would be further evident if we placed one among the twelve so it would be clear." Again, "We had no intention of placing more than one negro on the panel. When we did that we had finished with the negro. That was the suggestion of the others and what Judge Adams thought about the selection of the grand jury."

Roy E. Douglas testified "At that time, Judge Adams, the judge of this court, made some reference or instructions about how to select the grand jury. He thought it well to select negroes on the grand jury. He said he thought it well to select a negro on the grand jury. There was no further discussion about that. We did select a negro on the grand jury." Again, "Yes, sir, there were other negroes' names mentioned besides the one we selected. We did not go talk to them; we liked this one, and our intentions were to get just one negro on the grand jury; that is right." Again, "I cannot say as to others as to what they were thinking about; all that I had in my mind was that it was not my intention to put more than one negro on the grand jury. That was my mind. It was my intention to put just one on so they would be represented on there."

Ernest R. Tennant testified "I did not have any intention of putting more than one on the list."

A number of county officers, deputies and former county officers and old residents of Dallas County testified that prior to October, 1942, no negroes had ever served as a grand juror in Dallas County, Texas. A number of the leading members of the negro race residents of Dallas County, including ministers, school-teachers, doctors, merchants, insurance and real estate dealers and lodge officials testified to the number of the negro population of Dallas County, and that the greater majority of them possessed the legal qualifications for a grand juror.

Your petitioner respectfully submits that the grand jury commissioner show, by their own testimony, that the

placing of the one negro on the grand jury panel was not a bona fide attempt to comply with the law as announced by this Court in the authorities cited, but was a subtle and artful attempt to evade the law, and that thereby this Petitioner was discriminated against and denied the equal protection of the law and was denied due process of law.

In the case of *Smith vs. The State of Texas*, 311 U. S. 128, Mr. Justice Black writing the opinion, it is said:

> "Officers of a State tribunal may not cover up their intended discrimination against the Negro race by a thin veneer of compliance and thereby evade the prohibition of the Fourteenth Amendment.
>
> "The Fourteenth Amendment requires that equal protection to all must be given—not merely promised. Here, the Texas Statutory scheme is not in itself unfair; it is capable of being carried out with no racial discriminations whatsoever. But, by reason of the wide discretion permissible in the various steps of the plan, it is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable.
>
> "The State argues that the testimony of the commissioners themselves show that there was no arbitrary or systematic exclusion. And it is true that two of the three commissioners who drew the September, 1938, panel testified to that effect. Both of them admitted they did not select any negroes although the subject was discussed, but both categorically denied that they intentionally, arbitrarily or systematically discriminated against negro jurors as such.
>
> "What the Fourteenth Amendment prohibits is racial discrimination in the selection of grand juries. Where the jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who know no negroes as well as from commission-

ers who know but eliminate them. If there has been discrimination, whether accomplished ingeniously or uningeniously, the conviction cannot stand."

In the case of the *United States ex rel, Jackson ex rel vs. Brady, Warden*, 133 Federal (2nd) 476, Mr. Justice Soper of the Circuit Court of Appeals, Fourth Circuit, says:

"A salutary warning on this subject was given the courts on September 8, 1942, in the report to the conference of the Chief Justice with the Senior Circuit Judges of the United States by a committee on Selection of Jurors, composed of District Judges of the United States. The report states:

"In each district where there is a large negro or other minority racial group the problem of selecting a suitable number of qualified representatives of that race is one that should receive the careful consideration of the clerk and the jury commissioner. The constitution together with the statutes and decisions, make it evident that any thing that amounts to a conscious and deliberate exclusion from jury lists of representatives of any class of persons on account of race, color, economic or social status is improper and may be unlawful. The selection of qualified persons to give adequate representation to certain groups may in some districts present difficulties. Nevertheless no jury panel can be regarded as secure from challenge unless there has been an earnest effort on the part of the Court, the Clerk and the Jury Commissioner to assure that there is no discrimination against these groups.

"Since the Scottsboro cases it has been the practice in several courts to include in the jury boxes the names of a few negroes to avoid the violations of the Fourteenth Amendment. The validity of this method may be questioned in the light of the Supreme Court's language in the case of Smith v. Texas, 1940, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84.

"In the last mentioned case, which considered the composition of the Grand Jury challenged by one convicted of crime, the number of negroes called for service and actually permitted to serve for a long time had been so scanty as to compel the conclusion that negroes had been arbitrarily and systematically excluded because of their race. In the pending case, considering the number of negro jurymen in service in Baltimore during a long period of years in comparison with the substantial size of the negro population, and taking this fact separate and apart from the surrounding circumstances, one might be disposed to infer that an intentional and systematic effort had been made to cut down the number of negro jurymen in such a fashion as to create the superficial appearance of obeying the constitutional mandates while actually ignoring them."

In the case of *Pierre vs. Louisiana*, 306 U. S. 354, 59 Sup. Ct. 536, Mr. Justice Black rendering the opinion for the Court, stated:

"Yet, when a claim is properly asserted—as in this case—that a citizen whose life is at stake has been denied the equal protection of his country's laws on account of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts—for equal protection to all is the basic principle upon which justice under law rests. Indictment by grand jury and trial by jury cease to harmonize with our traditional concepts of justice at the very moment particular groups, classes or races—otherwise qualified to serve as jurors in a community—are excluded as such from jury service. The Fourteenth Amendment intrusts those who because of race are denied equal protection of the laws in a State first to the revisory power of the higher courts of State, and ultimately to the review of this Court.

"Principles which forbid discrimination in the selection of petit juries also govern the selection of grand

juries. It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race, and no discrimination against them because of their color."

Mr. Chief Justice Hughes, in the case of *Norris vs. Alabama*, 294 U. S. 598, 55 Sup. Ct. Rep. 579, states:

"When a Federal right has been specially set up and claimed in a State court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a State court as to Federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the Federal right may be assured.

"* * * And the commissioner testified that in the selections for the jury roll no one was automatically or systematically excluded, or excluded on account of race or color; that he 'did not inquire as to color,' that was not discussed.

"* * * But, in appraising the action of the commissioners, these statements cannot be divorced from other testimony. As we have seen, there was testimony, not overborne or discredited, that there were in fact negroes in the county direct and specific. After eliminating those persons as to whom there was some evidence of lack of qualifications, a considerable number of others remained. The fact that the testimony as to these persons fully identified, was not challenged by evidence appropriately direct, cannot be brushed aside."

In *Lane vs. Wilson*, 307 U. S. 368, 50 Sup. Ct. Rep. 872, in an opinion of this Court by Mr. Justice Frankfurter, it is stated:

> "We, therefore, cannot avoid passing on the merits of plaintiff's constitutional claim. The reach of the Fifteenth Amendment against contrivances by a State to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color, has been amply expounded by prior decisions. Guinn v. United States, 238 U. S. 347, 55 S. Ct. 926, 59 L. Ed. 3140, L. R. A, 1916A, 1124. Myers v. Anderson, 238 U. S. 368, 35 S. Ct. 932, 59 L. Ed. 1349.
>
> "The amendment nullified sophisticated as well as simple minded modes of discrimination. It hits onerous procedure requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race. When in Guinn v. United States, supra, the Oklahoma 'grandfather clause' was found violative of the Fifteenth Amendment, Oklahoma was confronted with a serious task of devising a new registration system consonant with her own political ideas but also consistent with the Federal Constitution. We are compelled to conclude, however, reluctantly, that the legislation of 1916 partakes too much of the infirmity of the 'grandfather clause' to be able to survive."

We submit in addition to the foregoing the following statement of this Court in *Carter vs. Texas*, 177 U. S. 442, 20 S. Ct. 687, and *Martin vs. Texas*, 200 U. S. 316, 26 S. Ct. 338, to-wit:

> "What an accused is entitled to demand, under the constitution of the United States is that, in organizing the grand jury, as well as in the empaneling of the petit jury, there shall be no exclusion of his race, and no discrimination against them, because of their race or color."

Furthermore the attention of the Court is directed to the language of Judge Henderson of the Texas Court of Criminal Appeals in *Smith vs. State*, 77 S. W. Rep. 453, as follows:

> "An effort to comply with the Fourteenth Amendment and the decisions thereunder, instead of endeavoring to avoid the same, in a colored population shown to exist in Grayson County, might have entitled the negro race to a greater representation on both the grand and petit juries than here shown.
>
> "While we fully understand the sentiment that may have actuated the officers of the court below, and appreciate their disinclination to place the administration of the law, even in part, in the hands of a people assumed to be inferior to the white race, yet under the law and before the law all are equals, and in its administration no favors can be shown, nor can either the letter or spirit of the law be ignored."

In support of our contention herein under the First and Second Points above, we adopt the language of the Supreme Court in the foregoing citations as our brief and argument; we respectfully submit that the grand jury commissioners in the selection of the grand jury panel in putting one negro on the panel and limiting their consideration of the negro race to one, "covered up their intended discrimination against the negro race by a thin veneer of compliance and thereby evaded the prohibition of the Fourteenth Amendment," and proceeded "in such a fashion as to create the superficial appearance of obeying the constitutional mandates while actually ignoring them," and that they discriminated against this Petitioner and his race on account of color and race, thereby depriving him of the

equal protection of the law guaranteed him by the Fourteenth Amendment to the Constitution of the United States in Section 1 thereof.

Authorities under Third Pont

Constitution of the United States, Fourteenth Amendment, Section 1;
Constitution of the United States, Fifth Amendment;
Constitution of Texas, Article 1, Section 19;
Constitution of Texas, Article 5, Section 28;
Constitution of Texas, Article 5, Section 7;
Cooley's Constitution, 5th Ed. Chapter V, page 107;
Cooley's Constitution, 5th Ed. Chapter IV, page 78;
Scott vs. McNeal, 154 U. S. 34, Sup. Ct. Rep. Vol. 14, pp. 1108-14;
Revised Civil Statutes of Texas, Article 200-a, Section 5;
Pierson vs. State (Texas), 177 S. W. (2nd) 975;
People vs. Raymond, 37 N. Y. 428;
Devoy vs. New York, 35 Barb. 264;
People vs. Blake, 40 Barb. 9;
People vs. Albertson, 55 N. Y. 50;
State vs. Goldstucker, 40 Wis. 124;
Mason vs. Woerner, 16 Mo. 567;
Hobart vs. Hobart, 45 Iowa 501;
Levy vs. Bigelow, 6 Ind. Appeals 677;
In Re Terrell, 34 Pacific Rep. 457, 52 Kansas 29;
People vs. Opel, 58 N. E. Rep. 996, 188 Ill. 194.

Statement and Remarks

This cause was tried in the Criminal District Court of Dallas County, Texas, with the Honorable A. R. Stout, the Judge of the 40th Judicial District Court of Texas in and for Ellis County, Texas, presiding. Your petitioner in limine challenged the right of said Judge of the 40th Judicial District to preside upon the trial of this cause which challenge was in writing, and was by said Judge Stout overruled. This will fully appear from your Petitioner's Bill of Exceptions No. 2 as contained in the Transcript of the Record in this cause. By stipulation as contained in said Bill of Exceptions No. 2 it is shown that Judge Grover C. Adams was the regularly elected and qualified and acting judge of said Criminal District Court of Dallas County, Texas; that Judge Adams died August 25, 1943, during the July term, 1943 of said court; and that the Governor of Texas had not appointed a judge to fill the vacancy caused by the death of Judge Adams. That Judge A. R. Stout, judge of the 40th Judicial District of Texas in and for Ellis County, Texas, was acting herein by virtue of an assignment by Judge Claude M. McCallum, Judge of the 101st Judicial District Court of Dallas County, Texas, and acting as the Presiding Judge of the First Administrative Judicial District of Texas, and not by virtue of any appointment by the Governor of the State of Texas. That by reason of said death a vacancy occurred in the judgeship of said court that had not been filled at the time of the trial of this cause. The *Constitution of Texas*, Article 5, Section 28, provides the only method by which such vacancies *shall* be filled, as follows:

"Vacancies in the office of Judges of the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals and District Courts *shall* be filled by the Governor until the next succeeding general election." Thus it will be observed that the people by their constitution delegated the power to the Governor alone to fill vacancies, temporarily, in the named judgeships in the event of vacancies. No power in the matter was given the legislature at all, either to act itself or authorize any other officer to act in the premises. *Cooley's Constitution*, 5th Edition, Chapter V. page 107 says "Every positive declaration contains an implication against anything contrary to it, or which would frustrate or disappoint the purposes of it." Again, the same author, in Chapter IV, page 78 of the same volume says, "Another rule of construction is, that when the constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or extend the penalty to other cases." The case of *State vs. Goldstucker*, 40 Wisconsin 124, holds that "the legislature cannot provide for the choice of officers a different mode from that prescribed by the constitution."

The *Constitution of Texas*, Article 5, Section 7 gives the legislature the right to provide for the holding of District Court "when the judge thereof is absent, or is from any cause disabled or disqualified from presiding." This does not apply to vacancies or the filling of vacancies. Under the powers so given the legislature has provided for the election of a special judge by the lawyers of the court when the judge is absent; and it also enacted Article 200-a

of the Revised Civil Statutes of Texas. This Article creates Administrative Judicial Districts, a Presiding Judge of said Districts, and in Section 5 thereof, as originally enacted, it provided that "Judges may be assigned in the manner herein provided for the holding of District court when the regular judge thereof is absent or is from any cause disabled or disqualified from presiding, and in instances where the regular judge is present or himself trying cases where authorized or permitted by the Constitution and laws of the State." The 48th Legislature of Texas, in 1943, amended said Section 5 of Article 200-a of the Revised Civil Statutes of Texas, by adding to said Section the following: "And judges may also be assigned in the manner herein provided for the holding of a District Court, when by reason of the death, resignation, or from any cause whatsoever, the office of the District Judge of the District is, or has become vacant."

To show that it was the intent of the Legislature in passing said amendment to provide for the filling of a vacancy in the office of the judge of said courts, the emergency clause appended to said amendment reads "The fact that no clear provision of law exists at the present time to authorize the assignment of a District Judge *to fill a vacancy in case of death*, resignation, or for other reasons creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each house be suspended, and said Rule is suspended" etc. Petitioner submits that by this amendment the Legislature attempted to do, and provide for the doing of, what the people by their Constitu-

tion delegated solely to the Governor of the State; and that said amendment is unconstitutional and void, and conferred no authority on the Presiding Judge of the First Administrative Judicial District of Texas, to assign Judge Stout to preside over the trial of this cause, and that Judge Stout, by said assignment, acquired no legal right to so preside in said Criminal District Court or upon the trial of your Petitioner herein, and that his acts in so doing were absolutely void, and that the judgment of conviction herein is absolutely void. That by reason thereof this Petitioner is being deprived of his life without due process of law.

This Court in the case of *Scott vs. McNeal*, 154 U. S. 34, 14 Sup. Ct. Rep. 1108 (on page 1112) says:

> "No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.
>
> "The words 'due process of law' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, 'means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. *To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit.*' Tested by this rule Petitioner was not given a trial by due process of law. There was no legal court."

In the case of *Pierson vs. State*, 177 S. W. (2nd) 975, tried below in the Criminal District Court of Dallas County, and to which an outside judge had been assigned

in the same manner as in this case, our Court of Criminal Appeals of Texas, held "Appellant correctly asserts that the power to appoint a successor to a deceased district judge lies exclusively with the Governor of this State. The Constitution expressly so provides. It is also true that the Governor has not seen proper to appoint a successor to Judge Adams, and the Office of Judge of the Criminal District Court of Dallas County is now vacant." It further holds that the assigned judges "did not relinquish the offices they held, nor did they attempt to qualify as the successor of Judge Adams. *They did not purport to act as judge de jure or de facto of the Criminal District Court of Dallas County.*"

Petitioner submits that if that be true he was tried before a court that had no judge, the office of judge was vacant. That such is not a court. Mr. Bouvier defines a "court" to be "an incorporeal political being which requires for its existence the judges, or a competent number of them, and a clerk or prothonotary, at the term during which, and at the place where, it is by law authorized by law to be held, and the performance of some public act indicative of a desire to perform the functions of a court. In another sense, the judges, clerk or prothonotary, counsellors and ministerial officers are said to constitute a court." This definition has been expressly approved in *Mason vs. Woerner*, 18 Mo. 567 and *Hobart vs. Hobart*, 45 Iowa, 501, and *Levy vs. Bigelow*, 6 Indiana Appeals, 677.

In the cases of *Re Terrell*, 34 Pacific Rep. 457, 52 Kansas, 29, and *People vs. Opel*, 58 N. E. Rep. 996, 188 Illinois, 194, it is held that "The judge is an essential constituent of a court, and there can be no 'court' in the absence of the judge or judges." "A court can have no existence without a judge." Also, "A court has been defined to be a body in government for the public administration of justice at the time and place prescribed by law; *and it has been said that a 'court' is an incorporeal being which requires for its existence the presence of the judge.*"

Your Petitioner most respectfully insists that he was tried before a body that was not a "court" in law because of the unfilled vacancy in the office of the judge, and presided over by a judge of another court, not as the judge either de facto or de jure of said court, and whose assignment thereto was not by virtue of any legal authority. That he is being deprived of his life without due process of law, said proceedings not constituting "due process of law" as guaranteed him by the Constitution of the United States and of Texas.

For the foregoing reasons your Petitioner most respectfully submits that the Writ of Certiorari herein applied for should be granted and that the judgment of the Court of Criminal Appeals of Texas herein should be reviewed, and, upon review should be in all things reversed and held for naught; and this cause remanded to said Court of

Criminal Appeals for further orders in accordance with the Judgment of this Court.

Respectfully submitted,

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and

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Service of a copy of the foregoing brief, together with copy of Petition for Writ of Certiorari was made on the Attorney General of Texas, Attorney for Respondent, by mail, on this, the 12th day of January, 1945.

W. J. DURHAM,
Of Counsel.

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No. 853

In the
Supreme Court of the United States
OCTOBER TERM, 1944

L. C. AKINS,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Certiorari from the Court of Criminal Appeals of Texas.

BRIEF FOR THE PETITIONER

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WARLICK LAW PRINTING CO., INC.—*Law Brief Printing*—Dallas, Texas—Central-4091

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THE STATE OF TEXAS,
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BRIEF FOR THE PETITIONER

The opinion of the Court of Criminal Appeals of Texas in this cause is reported in *Akins v. State*, 182 S. W. Rep. (2d) pp. 723-724.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

FIRST

Your petitioner is a negro, a member of the African race. In the formation of the grand jury that returned the bill of indictment herein on which he was tried and convicted in this cause in the State court and given a sentence of death, this defendant and his race were discrimi-

nated against on account of their race and color in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. That thereby he was denied the equal protection of the law.

SECOND

That the tribunal before which he was tried and convicted in this cause had no legal power, authority or jurisdiction to try this cause, and was not a legally constituted court, and that by reason thereof this petitioner is being deprived of his life without due process of law in violation of the Fifth Amendment to the Constitution of the United States, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Your petitioner, who is an American citizen and a negro, a member of the African race, was indicted by a purported grand jury in the Criminal District Court of Dallas County, Texas, charged with the offense of murder. He duly filed, in limine, in said court his motion to quash the indictment on the ground that in the formation of the grand jury that returned same he had been discriminated against on account of his race and color; had been denied due process of law, and the equal protection of the law as guaranteed him under the Fourteenth Amendment, Section 1, of the Constitution of the United States. That the grand jury that returned said indictment was selected by the jury commissioners who drew the grand jury panel from which the grand jury was selected, and said grand jury commis-

sioners deliberately, intentionally and purposely limited the number of the Negro race that should be selected on said grand jury panel to one member. That there was a large number of negroes and members of the negro or African race in Dallas County, Texas, who possessed the legal qualifications of grand jurors, but said grand jury commissioners deliberately, intentionally and purposely excluded all members of said race from said grand jury panel except one. That said manner of selecting said grand jury panel in fact discriminated against your petitioner and his race on account of their race and color, and was an artful and tactful evasion of the petitioner's constitutional rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States. (R. 19 to 43.)

In support of said motion to quash said indictment testimony was taken before the court which showed that said grand jury commissioners in the selection of the said grand jury panel purposely and intentionally limited the number of members of the negro race on said panel to one, and that they would not consider putting more than one negro on the grand jury panel. (This will more fully appear from petitioner's Bill of Exception No. 1 as contained in the record, R. 19 to 43.) Thereupon the court overruled said motion and petitioner duly reserved his exception to said ruling. (R. 43.)

The regularly and duly elected, qualified and acting judge of the Criminal District Court of Dallas County, Texas; Judge Grover C. Adams, had theretofore died, thereby creating a vacancy in the office of judge of said court, and the Governor of Texas not having filled said

vacancy, and no general election having intervened at which said vacancy had been filled, the Honorable A. R. Stout, the judge of the 40th Judicial District of Texas in and for Ellis County, Texas, appeared by virtue of an assignment by the presiding judge of the First Administrative Judicial District of Texas, and assumed to preside over, and hold court for said Criminal District Court of Dallas County, Texas, and to preside over the trial of this petitioner in this cause. Upon the call of this cause for trial, and before any announcement of ready had been had or plea taken, herein, your petitioner, in limine, duly filed and presented to said judge his objections to being tried in said court at said time and before the said Judge Stout so assuming to preside over said trial, because of said vacancy in said office of judge of said court, and because said presiding judge of said First Administrative Judicial District had no legal authority to assign said judge to preside in the event of a vacancy caused by the death of the judge of said court; but such authority to fill said vacancy under the Constitution of Texas rested solely with the Governor of Texas. Upon a hearing of said objections the facts relative to the death of Judge Adams, the failure of the governor to fill the vacancy, and the assignment of Judge Stout to preside over the Criminal District Court of Dallas County, Texas, by the presiding judge of the First Administrative Judicial District of Texas, were duly stipulated in the record in this cause. (R. 47.) These objections were overruled by said acting judge, and this cause proceeded to trial before said acting judge. To this ruling the petitioner duly excepted. (R. 44 to 47.)

Thereupon the case was tried to a jury which resulted in a verdict of conviction with the penalty assessed at death, Petitioner duly appealed from said judgment of conviction to the Court of Criminal Appeals of Texas, which court affirmed the judgment of the court below, and overruled this petitioner's motion for a rehearing. See judgment of affirmance (R. 96), and order overruling motion for rehearing (R. 103). Also, *Akins v. State*, 182 S. W. (2d) 723-4.

ASSIGNMENTS OF ERROR

FIRST

The judgment of the Court of Criminal Appeals of Texas in affirming the judgment of the Criminal District Court of Dallas County, Texas, in this cause, and in overruling this petitioner's motion to quash the indictment in this cause is contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and violated the rights of this petitioner under said amendment in that in the formation of the grand jury that returned the bill of indictment herein there was discrimination against this petitioner and the members of the negro or African race on account of race and color, and this petitioner was thereby denied the equal protection of the law guaranteed him under said amendment to the Constitution of the United States.

SECOND

Said judgment of the Court of Criminal Appeals of Texas in affirming the Criminal District Court of Dallas

County, Texas, in this cause in overruling this petitioner's motion to quash the indictment herein on account of racial discrimination against him and his race deprives this petitioner of his life without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and in violation of the Fifth Amendment to the Constitution of the United States.

THIRD

The Honorable A. R. Stout, the judge of the Fortieth District Court of Texas in and for Ellis County, Texas, having no authority in law to preside as the judge of the Criminal District Court of Dallas County, Texas, in the trial of this cause, said trial and judgment rendered thereunder is a nullity, and the judgment of the Court of Criminal Appeals of Texas in affirming said purported judgment, and said purported judgment, do not constitute due process of law, and thereby this petitioner is being deprived of his life without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of the Fifth Amendment to the Constitution of the United States.

Authorities under the First and Second Assignments of Error

Constitution of the United States, Sec. 1 Fourteenth Amendment;

Constitution of the United States, Fifth Amendment;

Hill v. Texas, 316 U. S. 400, 62 Sup. Ct. Rep. 1048;

Akins v. State (*Texas*), 167 S. W. (2d) 758;

Pierre v. Louisiana, 306 U. S. 370, 59 Sup. Ct. Rep. 536;
Neal v. Delaware, 103 U. S. 370;
United States Ex Rel Jackson et al. v. Brady, Warden, 133 Fed. (2d) 476;
Norris v. Alabama, 294 U. S. 598, 55 Sup. Ct. Rep. 579;
Lane v. Wilson, 307 U. S. 368, 50 Sup. Ct. Rep. 872;
Guinn et al. v. U. S., 238 U. S. 347, 55 Sup. Ct. Rep. 926.
Myers v. Anderson, 238 U. S. 368, 55 Sup. Ct. Rep. 932;
Carter v. Texas, 177 U. S. 442, 20 Sup. Ct. Rep. 687;
Martin v. Texas, 200 U. S. 316, 26 Sup. Ct. Rep. 338;
Smith v. State (Texas), 77 S. W. Rep. 453.

Argument under First and Second Assignments of Error

The record in this cause as shown in the testimony of Carl F. Barth as contained in petitioner's Bill of Exceptions No. 1 (R. 34 and 35) shows that, according to the United States Census of 1940 the white population of Dallas County, Texas, was 336,851, and the negro population of said county was 61,605. It was further shown that of the negro population in Dallas County approximately 95% of them can read and write. (R. 35 to 39.) A large per cent of the negro population of the county own real estate either in the county or in the State of Texas. (R. 39, 40 and 41.) Among this population were preachers, teachers, merchants, insurance men, brokers, lawyers, physicians and tradesmen and laborers. Of this 61,605 a substantial percentage

are legally qualified to serve as grand jurors in Dallas County.

The testimony given under the petitioner's motion to quash the indictment, as shown by his Bill of Exceptions No. 1 in the Transcript of the Record herein (R. 23 to 42) shows that prior to the October Term, 1942 of the Criminal District Courts of Dallas County, Texas, there had never been a negro, or member of the African race to serve on a grand jury in Dallas County, Texas. That after this court reversed the case of *Hill v. Texas*, in June, 1942, one negro was put on the grand jury for the October Term, 1942 of said courts, and one, to-wit, C. D. Johnson, was put upon the grand jury for the January Term, 1943 of the Criminal District Court of Dallas County, Texas, which was the grand jury that returned the bill of indictment against this petitioner in this cause. The grand jury commissioners who selected the grand jury panel of sixteen men from which the grand jury was selected for said January, 1943 term, were W. H. Wells, Roy E. Douglas and Ernest R. Tennant. (R. 28.)

As to the method of selecting a member of the negro race on the grand jury panel each of said commissioners testified. W. H. Wells testified: "We were advised by Judge Grover Adams that the Supreme Court had ruled that we could not discriminate against any one because of his color, if I recall, they had not been discriminating for selection of the grand jury panel; and in turn they said there were sixteen, and it would be further evident if we placed one among the twelve so it would be clear." (R. 26.) Again he said "We had no intention of placing more than one

negro on the panel. When we had done that we had finished with the nergo. That was the suggestion of the others, and what Judge Adams thought about the selection of the grand jury." (R. 26.) "Judge Adams had suggested that a negro be selected on it." (R. 27.)

Ernest R. Tennant testified: "We three did not go to see any other negroes, that is the only one. I did not have any intention of putting more than one on the list." (R. 28-29.)

Roy E. Douglas testified: "At that time Judge Adams, the judge of this court, made some reference or instructions about how to select the grand jury. He thought it well to select negroes on the grand jury. He said he thought it would be well to select a negro on the grand jury." (R. 32.) Again he said, "Yes, sir, there were other negroes' names mentioned besides the one we selected; we did not go talk to them; we liked this one, and our intentions were to get just one negro on the grand jury; that is right. No, I did not have any intention of placing more than one negro on the grand jury." (R. 32.)

Your petitioner respectfully submits that the testimony of these three commissioners shows that they were advised, and had in mind, the decisions of this court with reference to racial discrimination in the selection of the grand jury panel, and that their acts in the premises was a subtle and artful attempt to evade the law, and was not a bona fide attempt to comply with the law as announced by this court in the authorities cited, and especially with reference to the Hill case that was then fresh in their minds

and was the moving cause prompting their acts in the premises as well as the admonitions of the judge of the lower court.

In the case of *Smith v. Texas*, 311 U. S. 128, this court said:

> "Officers of a State tribunal may not cover up their intended discrimination against the negro race by a thin veneer of compliance and thereby evade the prohibition of the Fourteenth Amendment."

That case further holds that:

> "If there has been discrimination, whether accomplished ingeniously or uningeniously, the conviction can not stand."

In the case of the *United States ex rel Jackson v. Brady, Warden*, 133 Fed. (2d) 476, Mr. Justice Roper of the Circuit Court of Appeals for the Fourth Circuit, speaking for the court, says:

> "In each district where there is a large negro or other minority racial group the problem of selecting a suitable number of qualified representatives of that race is one that should receive the careful consideration of the clerk and jury commissioners. The constitution together with the statutes and decisions make it evident that anything that amounts to a conscious and deliberate exclusion from jury lists or representatives of any class of persons on account of race, color, economic or social status is improper and may be unlawful. The selection of qualified persons to give adequate representation of certain groups may in some districts present difficulties. Nevertheless no jury panel can be regarded as secure from challenge unless there has been an earnest effort on the part of the court, the clerk and the jury commissioners to assure that there is no discrimination against these groups.

"Since the Scottsboro cases it has been the practice in several courts to include in the jury boxes the names of a few negroes to avoid the violation of the Fourteenth Amendment. The validity of this method may be questioned in the light of the Supreme Court's language in the case of Smith v. Texas, 1940, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84.

"In the last mentioned case, which considered the composition of the grand jury challenged by one convicted of crime, the number of negroes called for service and actually permitted to serve for a long time had been so scanty as to compel the conclusion that negroes had been arbitrarily and systematically excluded because of their race. In the pending case, considering the number of jurymen in service in Baltimore during a long period of years with the substantial size of the negro population, and taking this fact separate and apart from the surrounding circumstances, one might be disposed to infer that an intentional and systematic effort had been made to cut down the number of negro jurymen in such a fashion as to create the superficial appearance of obeying the constitutional mandates while actually ignoring them."

In the case of *Lane v. Wilson*, cited above, this court, in a case involving the application of the Fifteenth Amendment to the Constitution, with reference to the right of suffrage, uses this language which we think pertinently applicable to the case at bar,

"The amendment nullified sophisticated as well as simple minded modes of discrimination."

In *Pierre v. Louisiana*, cited above, this court uses this language:

"Yet, when a claim is properly asserted—as in this case—that a citizen whose life is at stake has been denied equal protection of his country's laws on ac-

count of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts—for equal protection to all is the basic principle upon which justice under law rests."

In *Norris v. Alabama*, cited above, this court also said:

"When a Federal right has been specially set up and claimed in a State court, it is our province to inquire not merely whether it was denied in express terms, or whether it was denied in substance and effect. If this requires an examination of the evidence, that examination must be made. Otherwise, review by this court would fail of its purpose in safeguarding constitutional rights."

Your petitioner most respectfully asks that this Honorable Court so examine into the facts as contained in his record herein, and insists that same will disclose a subtle, artful and tactful discrimination against him and his race on account of color, and was but a "thin veneer of compliance", but an evasion of "the prohibition of the Fourteenth Amendment."

Authorities under the Third Assignment of Error

Constitution of the United States, Fourteenth Amendment, Sec. 1;
Constitution of the United States, Fifth Amendment;
Constitution of Texas, Article 1, Sec. 19;
Constitution of Texas, Article 5, Sec. 28;
Constitution of Texas, Article 5, Sec. 7;
Cooley's Constitution, 5th Ed., Chap. V., p. 107;
Cooley's Constitution, 5th Ed., Chap. IV. p. 78;
Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. Rep. 1108-1114;

Revised Civil Statutes of Texas, Article 200-a, Sec. 5;
Pierson v. State (Texas), 177 S. W. (2d) 975;
Devoy v. New York, 35 Barb. 264;
People v. Raymond, 37 N. Y. 428;
People v. Blake, 40 Barb. 9;
People v. Albertson, 55 N. Y. 50;
State v. Goldstucker, 40 Wisconsin 124;
Mason v. Woerner, 16 Missouri 567;
Hobart v. Hobart, 45 Iowa 501;
Levy v. Bigelow, 6 Indiana Appeals, 677;
In re Terrell, 34 Pacific Rep. 457; 52 Kansas 29;
People v. Opel, 58 N. E. Rep. 996; 188 Illinois 194.

Statement and Remarks under Third Assignment of Error

By stipulations embodied in petitioner's Bill of Exceptions No. 2 (R. 47), and the stipulations embodied in petitioner's Bill of Exceptions No. 3 (R. 49 and 50), the following facts were ascertained and admitted:

That the regularly elected, qualified and acting judge of the Criminal District Court of Dallas County, Texas, Judge Grover C. Adams, died on August 25, 1943, during a former term of said court. That there was thereby created a vacancy in the judgeship of said court. That no successor of said judge has been appointed by the Governor of the State of Texas, to fill said vacancy caused by the death of Judge Adams. Judge A. R. Stout, the district judge for the 40th District of Texas, for Ellis County, Texas, presided in said court and on the trial of this cause by virtue of an assignment by Judge Claude M. McCallum, judge of the 101st District Court in and for Dallas County, Texas,

and acting as the presiding judge of the First Administrative Judicial District of Texas, and not by virtue of any appointment by the Governor of the State of Texas. That the term of said court at which this cause was tried was the October Term, A. D. 1943, which convened on October 4, 1943, if same was ever in reality convened.

The Constitution of Texas, Article 5, Section 28, provides the only method by which a vacancy in the office of a judge of a district court shall be filled, which is as follows: "Vacancies in the office of judges of the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals and District Courts *shall* be filled by the governor until the next succeeding general election". From this it is clear the people of Texas by their constitution delegated to the governor alone the power to fill vacancies, temporarily, in the offices of the judges named, and entrusted that power to no other person or body, not even to the legislature. No power is given the legislature at all in this matter, either to act itself or authorize any other officer to act in the premises. *Cooley's Constitutional Limitations*, 5th Ed., Chap. V, on page 107, says: "Every positive declaration contains an implication against anything contrary to it, or which would frustrate or disappoint the purposes of it". Again, the same author, in the same volume, in Chapter IV on page 78, further says: "Another rule of construction is, that when the constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is implied against legislative interference to add to the condition or extend the penalty to other cases."

The case of *State v. Goldstucker*, 40 Wisconsin 124, cited above, holds that "the legislature cannot provide for the choice of officers a different mode from that prescribed by the constitution."

The *Constitution of Texas*, Article 5, Sec. 7, cited above, confers on the legislature the right to provide for the holding of a district court "when the judge thereof is absent, or is for any cause disabled or disqualified from presiding"; but it does not provide for filling vacancies in the office of the judge. The legislature has acted under this constitutional grant of power and provided for the election of a special judge by the lawyers, and for the exchange of benches by judges. It also, by Article 200-a of the *Revised Civil Statutes of Texas*, has created Administrative Judicial Districts in Texas; and Section 5 thereof, as originally enacted, provides that "Judges may be assigned in the manner herein provided for the holding of district courts when the regular judge thereof is absent or is from any cause disabled or disqualified from presiding, and in instances where the regular judge is present or himself trying cases where authorized or permitted by the constitution and laws of the State". The 48th Legislature of Texas, in 1943, however, amended said Section 5 of said Article 200-a by adding thereto the following: "And judges may also be assigned in the manner herein provided for the holding of a district court when, by reason of the death, resignation, or from any cause whatsoever, the office of the district judge of the district is, or has become vacant". It was by virtue of this amendment that the presiding judge of the First Administrative Judicial District of Texas as-

signed Judge Stout to preside as judge of the Criminal District Court of Dallas, County, Texas upon the trial of this cause. Petitioner insists that said amendment is in violation of the Constitution of Texas cited above, and is wholly unconstitutional and void and conferred no authority upon said presiding judge or upon said Judge Stout to act in the premises.

In the case of *Pierson v. State*, 177 S. W. (2d) 975, this issue was involved based upon similar circumstances. In that case our Court of Criminal Appeals held that it was not the purpose of the legislature in enacting said amendment to provide for the filling of the vacancy in the judgeship caused by death, resignation, etc. Yet, the intention of the legislature in said matter is clearly shown by the "Emergency Clause" to said amendment, which is as follows: The fact that no clear provision of law exists at the present time to authorize the assignment of a district judge to FILL A VACANCY IN CASE OF DEATH, resignation or for other reasons, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each House be suspended, and said rule is hereby suspended, and that this Act shall take effect and be in force from and after its passage, and it is so enacted". Petitioner submits that, the opinion of the Court of Criminal Appeals in the *Pierson case* cited above to the contrary notwithstanding, the legislature in passing this amendment undertook to do that which the people by their Constitution had delegated solely

to the governor, and that this amendment is unconstitutional and void and conferred no legal authority upon the presiding judge of the First Administrative Judicial District to assign Judge Stout to preside over the trial of this cause; nor upon Judge Stout to preside over the Criminal District Court of Dallas County or upon the trial of your petitioner herein, and that his acts in so doing were void. That by reason thereof your petitioner is being deprived of his life without due process of law in violation of his constitutional rights.

This court in the case of *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. Rep. 1108 (on p. 1112) says:

> "No judgment of a court is 'due process of law' if rendered without jurisdiction in the court or without notice to the party.
>
> "The words 'due process of law' when applied to judicial proceedings, as was said by Mr. Justice Fields, speaking for this court, 'means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. *To give such proceedings any validity there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit.' Tested by this rule petitioner was not given a trial by due process of law. There was no legal court.*"

In the *Pierson case*, cited above, the Court of Criminal Appeals in passing on the identical question raised here said: "Appellant correctly asserts that the power to appoint a successor to a deceased district judge lies exclusively

with the governor of the State. The Constitution expressly so provides. It is also true that the governor has not seen proper to appoint a successor to Judge Adams, and the office of Judge of the Criminal Court of Dallas County is now vacant." It further says, with reference to the judges so assigned that they "did not relinquish the offices they held, nor did they attempt to qualify as the successor to Judge Adams. *They did not purport to act as judge de jure or de facto of the Criminal District Court of Dallas County.*" If that is true, the petitioner is in the anomolous situation of having been tried before a tribunal without a judge, either de jure or de facto, presiding; the office of judge of that tribunal being vacant. That such is not a court, we submit, is evident.

In the cases of *Mason v. Woerner*, 18 Missouri 567, and *Hobart v. Hobart*, 45 Iowa 501, and *Levy v. Bigelow*, 6 Indiana Appeals 677, cited above, the definition of a "court" given by Mr. Bouvier, is expressly approved. Mr. Bouvier defines a "court" to be "an incorporeal political being which requires for its existence the judges, or a competent number of them, and a clerk or prothonotary, at the term during which, and at the place where, it is by law authorized by law to be held, and the performance of some public act indicative of a desire to perform the functions of a court. In another sense, the judges, clerk or prothonotary, counsellors, and ministerial officers are said to constitute a 'court'."

In the cases of *Re Terrell*, 34 Pacific Rep. 457; 52 Kansas 29, and *People v. Opel*, 58 N. E. Rep. 996; 188 Illinois 194, cited above, it is held that:

> "The judge is an essential constituent of a court, and there can be no 'court' in the absence of the judge or judges."

And

> "A court can have no existence without a judge."

And

> "It has been said that a 'court' is an incorporeal being which requires for its existence the presence of the judge."

Your petitioner most respectfully insists that he was tried in this cause before a body that was not a "court" in law by reason of the unfilled vacancy in the office of the judge of said court, and presided over by a judge of another court acting not as the judge de jure nor de facto of said court, and whose assignment thereto was not by any legal authority. That the proceedings do not constitute due process of law as guaranteed him under the Constitution of the United States, and he is being deprived of his life without due process of law, in violation of the Constitution of the United States and of the State of Texas.

For the foregoing reason your petitioner most respectfully prays that this Honorable Court reverse the judgments of the Court of Criminal Appeals of Texas and of the Criminal District Court of Dallas County, Texas, and hold same for naught; and that this cause be remanded to

the Court of Criminal Appeals of Texas for further orders in accordance with the judgment of this court herein.

Respectfully submitted,

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I hereby certify that I have this, the 23rd day of April, 1945, by due course of mail served a copy of the foregoing brief on the Attorney General of Texas, the attorney for the respondent herein.

A. S. Baskett

Attorney for the Petitioner.

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No. 853

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

L. C. AKINS

v.

THE STATE OF TEXAS

On Certiorari from the Court of Criminal Appeals of the State of Texas

BRIEF FOR THE STATE OF TEXAS

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No. 853

IN THE

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OCTOBER TERM, 1944

L. C. AKINS

v.

THE STATE OF TEXAS

On Certiorari from the Court of Criminal Appeals of the State of Texas

BRIEF FOR THE STATE OF TEXAS

PRELIMINARY STATEMENT

Petitioner, L. C. Akins, a colored citizen of Texas, has been twice indicted and tried for the murder of

one V. L. Morris. The first conviction was reversed, and the indictment upon which it was predicated was ordered quashed by the Court of Criminal Appeals of Texas, the state court of last resort having appellate jurisdiction in criminal cases.[1] Upon such action, the original indictment was dismissed, and the instant prosecution instituted through the finding of a new indictment by another grand jury. The grand jury which reindicted Akins had within its membership a member of his race; the first grand jury had no negroes.

Prior to the trial of Akins by petit jury in the instant case, the judge of the Criminal District Court of Dallas County, Texas, died, said court having assumed jurisdiction of the case. Pursuant to section 5 of the Acts of the 40th Legislature, 1927,[2] as amended in 1943,[3] the Presiding Judge of the proper Administrative Judicial District assigned Honorable A. R. Stout, the judge of the District Court of Ellis County, Texas, to preside in the Criminal District Court of Dallas County. Judge Stout presided in said Dallas County court upon the trial of this case.

This court having granted a writ of certiorari, the case is now before it upon three points as urged by

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[1] Akens v. State, 145 Tex. Cr. R. 289, 167 S. W. 2d 758.

[2] General and Special Laws, 40th Leg., Reg. Sess., ch. 156, p. 228, printed as § 5, Art. 200a, Vernon's Annotated Civil Statutes of Texas.

[3] General and Special Laws, 48th Leg., Reg. Sess., ch. 22, p. 25, printed as § 5, Art. 200a, Vernon's Annotated Civil Statutes of Texas, pocket port.

Petitioner.[4] In substance it is alleged in the first two points that Akins was denied equal protection and due process of law by virtue of discrimination on the part of the jury commissioners drawing the grand jury, resulting in there being *only one negro* on the body presenting the indictment against him.

In the third point urged, it is insisted that Petitioner was tried before an illegal court in that the Texas statute under which Judge Stout presided at his trial contravened the State Constitution, and that he was thereby also deprived of due process of law.

The Texas Court of Criminal Appeals has decided all three points adversely to the contention of Petitioner.[5]

COUNTERPOINTS

FIRST:

The judgments of the Court of Criminal Appeals and of the Criminal District Court of Dallas County, Texas, should be sustained, the evidence and testimony before the trial court not having shown that in the formation of the grand jury that returned the indictment in this case that there was discrimination against the Petitioner or against the negro race;

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[4] Brief of Petitioner upon his Petition for a Writ of Certiorari, pp. 4-6.

[5] Akins v. State, __ Tex. Cr. R. __, 182 S. W. 2d 723; R. 96, 103.

the Petitioner was therefore not denied the equal protection of the law guaranteed under Section 1 of the Fourteenth Amendment to the Constitution of the United States.

SECOND:

Said judgments should be affirmed, the entire record showing that the refusal to quash the indictment was sustained by evidence and testimony; there being no racial discrimination against Petitioner and his race, he was not deprived of his rights without due process of law in violation of the Fourteenth Amendment to the Constitutiona of the United States, nor in violation of the Fifth Amendment to said Constitution, nor any other section thereof.

THIRD:

There was no violation of due process of law as contemplated by Section 1 of the Fourteenth Amendment to the Constitution of the United States, nor the Fifth Amendment thereto, in the action of Judge A. R. Stout in presiding as the acting judge of the Criminal District Court of Dallas County, Texas, said judge being duly authorized by statutes of the State of Texas to so preside; said statutes having been judicially determined to be valid statutes by the court of last resort in the State.

ARGUMENTS AND AUTHORITIES
(Pertinent to First Two Counter-points)

The Texas method of selection and organization

of grand juries, insofar as is provided by its Constitution and statutes[6] has been declared by this court to be basically legal and fair. Five years ago, in the case of *Smith* v. *Texas*, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84, it was said:

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[6]Article 5, Section 13, of the Constitution of Texas provides that a grand jury shall be composed of twelve men but that nine members thereof shall be a quorum to transact business and present bills of indictment.

Article 16, Section 19, of the Texas Constitution provides that the Legislature shall prescribe by law the qualifications of grand jurors.

Article 333 of the Code of Criminal Procedure of Texas provides that the District Judge shall appoint three jury commissioners.

Article 335 of the Code of Criminal Procedure provides that said grand jury commissioners shall appear before the Judge and take an oath that they will not knowingly select a grand juror whom they believe to be unfit or not qualified.

Article 336 of the Code of Criminal Procedure provides that at the time the jury commissioners are sworn in by the Judge he shall instruct them as to their duties.

Article 338 of the Code of Criminal Procedure of Texas provides that the jury commissioners shall select sixteen men from different portions of the county to be summoned as grand jurors for the next term of court.

Article 339 of the Code of Criminal Procedure provides that a grand juror must have certain qualifications (see note 10, infra.)

Article 340 of the Code of Criminal Procedure requires that the list of names selected to serve as grand jurors be sealed in an envelope.

Article 344 of the Code of Criminal Procedure requires the District Clerk to open said envelope thirty days before court meets and make a copy of the grand jury and deliver it to the Sheriff.

It is therefore apparent that every precaution possible has been taken to prevent any discrimination against any class or classes of people in serving on grand juries because of their race or religious creed.

"Here, the Texas statutory scheme is not in itself unfair; it is capable of being carried out with no racial discrimination whatever. * * * "

A comparatively recent reference to the above quotation from the Smith case appears in *Snowden v. Hughes*, 321 U. S. 1, 64 S. Ct. 397, 401, where the citation is used to support the statement that "the denial of equal protection by the exclusion of negroes from a jury may be shown by extrinsic evidence of a purposeful discriminatory administration of *a statute fair on its face.*"

Thus, we begin this argument secure in the knowledge that the laws of Texas are safe from attack, this court having already determined their inherent validity. The sole question in this feature of the case is whether or not the evidence offered on the trial as well as any "extrinsic evidence" shows a "purposeful discriminatory administration" as against Petitioner Akins and the members of the negro race.

In this connection we respectfully invite the attention of this court to its holdings that "a discriminatory purpose *is not presumed*,"[1] but that "there must be a showing of 'clear and intentional discrimina-

[1] Tarrance v. State of Florida, 188 U. S. 519, 520, 23 S. Ct. 402, 403, 47 L. Ed. 572, cited in Snowden v. Hughes, supra.

tion' ";[8] and "*actual discrimination because of race.*"[9]

The 1940 census shows 336,851 white and 61,605 negro population in Dallas County. The Regional Manager of the Western Department of Commerce testified that he was custodian of the census, and gave the above figures, but the witness threw no light upon the number of negroes meeting the statutory qualifications prescribed for grand jurors. He did not know the percentage of property owners; nor how many were qualified to vote; nor how many could read and write, nor how many were above the age of twenty-one years, and who had never been convicted of a felony.[10] (R. 34-35).

Twenty other witnesses were placed under oath in

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[8]Gundling v. City of Chicago, 177 U. S. 183, 186, 20 S. Ct. 633, 635, 44 L. Ed. 725; see Ah Sin v. Wittman, 198 U. S. 500, 507, 508, 25 S. Ct. 756, 758, 759, 49 L. Ed. 1142; Bailey v. State of Alabama, 219 U. S. 219, 231, 31 S. Ct. 145, 147, 55 L. Ed. 191, all cited in **Snowden v. Hughes**, supra.

[9]State of Virginia v. Rives, 100 U. S. 313, 322, 323, 25 L. Ed. 667; Martin v. State of Texas, 200 U. S. 316, 320, 321, 26 S. Ct. 338, 339, 50 L. Ed. 497; Thomas v. State of Texas, 212 U. S. 278, 282, 29 S. Ct. 393, 394, 53 L. Ed. 512; cf. Williams v. State of Mississippi, 170 U. S. 213, 225, 18 S. Ct. 583, 588, 42 L. Ed. 1012; all cited in **Snowden v. Hughes**, supra.

[10]Article 339, Texas Code of Criminal Procedure prescribes the qualifications of grand jurors, and reads as follows:

"Art. 339. Qualifications

"No person shall be selected or serve as a grand juror who does not possess the following qualifications:

1. He must be a citizens of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but wherever it shall be made to appear to the court that the requisite number of

an effort to sustain Petitioner's motion to quash the indictment. Without exception, in the testimony of not a single witness, and, as we view it, not in the sum total of the testimony of all twenty-one of the witnesses, is to be found proof of a sufficient number of potentially qualified grand jurors within the negro race in Dallas County to substantiate the alleged race discrimination Petitioner urges as having been practiced against him in this case.

It may be said to fairly appear from the testimony in this case that the opinion of this court in the Hill case [11] created a profound impression upon those charged with the duty of selecting grand jurors in Dallas County. Jury commissioners discontinued their practice of omitting to list negroes for such service. The Hill case was decided on June 1, 1942. As early as the October term, 1942, a negro was drawn, impaneled, and served, and the record discloses that in virtually every term of court since there has been a negro upon each grand jury (R. 25).

True it is that this record reflects that the three jury commissioners acting in their official capacity

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jurors who have paid their poll taxes can not be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.

"2. He must be a freeholder within the State, or a householder within the county.

"3. He must be of sound mind and good moral character.

"4. He must be able to read and write.

"5. He must not have been convicted of any felony.

"6. He must not be under indictment or other legal accusation for theft or of any felony."

[11] Hill v. State of Texas, 316 U. S. 400, 62 S. Ct. 1159, 86 L. Ed. 1559, also appealed from Dallas county.

in drawing grand jurors who indicted Petitioner in this case, made a personal investigation by interviewing the negro whom they selected, But there is no suggestion of any nature, either in the record or in the brief of Petitioner, that in so doing, they conducted themselves in any improper manner. In the opinion delivered by the Chief Justice of this court in the Hill case, it is noted that the jury commissioners there concerned "testified that they made no investigation or inquiry to ascertain whether there were negroes in the county qualified for grand jury service." The commissioners in the instant case satisfied themselves by personal observation that C. D. Johnson, the negro, was "thoroughly qualified under the law." Thereupon Johnson was placed upon the grand jury list, qualified, and served. All of the others (the white men) selected upon the jury were personally known to the commissioners, and one of the commissioners testified that they believed all of the grand jurors possessed the essential qualifications required under the Texas law. With reference to the selection of the negro, Johnson, this commissioner said.[13]

> "That is right, we were not doing any more with reference to the negro than by seeing that a negro was on the list of sixteen than the other fifteen members unless we had known them. Judge Adams never mentioned to us about putting one negro on the grand jury, or five or ten. Yes, that there must be representation for the race. *And we could not think of any personally*

[13]Testimony of Ernest R. Tennant, one of the jury commissioners (R. 29).

that possessed the qualification, and, just as suggested, this one, and we all went out and interviewed him. According to his answers, he thoroughly struck us men as being thoroughly qualified under the law, and we put his name on the list." (Italics supplied).

We respectfully submit that this court should read carefully the entire testimony of the three commissioners. Such reading will disclose not only the statements quoted by Petitioner in his brief, but additional ones which we submit will throw a different light upon the matter. For instance, W. H. Wells also testified:[14]

"There was nothing said about the number (of negroes) and nothing was said about the number on the panel. We discussed it quite a bit individually and together that we would have to recommend (negroes) were discussed amongst our acquaintances, and we recommend one up about Carrollton." (Parenthetical insertions ours).

Again, on cross-examination, the witness said:

"Judge Adams did not tell us to put one negro or five negroes on the grand jury. Yes, we just understood to see that negroes had representation on the grand jury, and we went out to see this particular one because we did not know him. I think we found out that he was over age. I did not even know that before. Among the white

[14]Testimony of W. H. Wells, a member of the jury commission R. 26).

people whose names might go on the grand jury unless I knew them personally and knew their qualifications, we went out and talked to them. No, we did not discriminate against a white man or a negro. I attempted not to."

In the testimony of Ernest R. Tennant will be found the following:[15]

"Yes, we complied with the law. In that list there was a negro, one negro. * * * When the grand jury commissioners were appointed by Judge Adams the only thing I remember he said is that we could not discriminate against the negro population being represented on the grand jury. No, he just outlined if he could qualify as a grand juror. In this particular instance we selected one negro on this panel; as far as I am concerned, I read in the paper that the Supreme Court of the United States stated that a negro could sit on the grand jury. * * * We did not then among the commissioners, Mr. Wells, Mr. Douglas and myself, (talk?) about complying with that instruction from the court; we just went straight to get negroes in Dallas County that we could find qualified. * * *." (Parenthetical insertion ours).

With reference to the quotation from Mr. Tennant's testimony as quoted in Petitioner's brief,[16]

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[15]Testimony of Ernest R. Tenant, a jury commissioner (R. 28).

[16]Brief of Petitioner Under his Petition for a Writ of Certiorari, p. 8: "Ernest R. Tennant testified **'I did not have any intention of putting more than one on the list."**

let us read from the record his entire sentence as it appears therein:

> "I did not have any intention of putting more than one on the list; I could not think of anybody; I would have if I could have thought of another one, and putting one on." (R. 29).

From the testimony of the third member of the jury commission, Roy E. Douglas, we take the following:[17]

> "At that time Judge Adams, the judge of this court made some reference or instructions about how to select the grand jury. He thought it well to select negroes on the grand jury. He said he thought it would be well to select a negro on the grand jury. There was no further discussion about that. We did select a negro on the grand jury."

On cross-examination by the State, the witness said:

> "That is right, we were not instructed by Judge Adams as to what number of negroes, but only to see that the negro race was given representation. We never agreed to select any certain number, but when we found one with all the qualifications of a grand juror we felt like that was satisfactory representation. We made it a point to get sixteen men that we found possessed of the qualifications under the law. No, sir, we did not have in mind to put any set number of representatives of the various races."

[17]Testimony of Roy E. Douglas, one of the jury commissioners (R. 32).

During the course of redirect examination, Mr. Douglas said:

> "No, sir, in that conversation I and the other commissioners had with Judge Adams, *that* was not any reference made as to what the ruling of the Supreme Court was with reference to placing negroes on the grand jury. There was no reference made to that. Yes, I knew about it. I had read about it in the newspapers. *That is the reason we placed this negro on that grand jury, to comply with the ruling of the United States Supreme Court;* and after Judge Adams thought it was advisable to have them on there. We knew, why. No I did not know it was to get around the ruling of the United States Supreme Court; *it was to comply with it.*" (Italics supplied).

On recross-examination by the State, the witness testified:

> "We did not agree to put eleven negroes and one white man on, no. That is right, *all that we were endeavoring to get a fair and impartial grand jury without any discrimination against any race on earth. We did not have in mind*, or the other commissioners *to put any set number on of any race*, white, yellow, or what-not." (Italics supplied).

Can it be said, *as a matter of law*, that in consideration of all the testimony, including that quoted above from the jury commissioners, that the record in this case satisfies the requirement laid down by this court that "there must be a showing of '*clear*

and intentional discrimination'"? Was there *"actual discrimination* because of race"?[18]

It is our sincere belief that upon the whole record, the Texas Court of Criminal Appeals is adequately supported in its conclusion that "we do not think that there was any discrimination shown." In addition, we likewise approve and adhere to the statement of the Presiding Judge of the Court of Criminal Appeals as made on motion for rehearing:

> "On the contrary, the evidence shows an effort on the part of the authorities to comply with the holding of this court and of the Supreme Court of the United States upon the question of discrimination."[19]

As to the "actual discrimination because of race,"[20] regardless of what may be surmised or found as a fact to have been the motives or incitements of the jury commissioners in this case, the truth remains that the colored population was represented on the grand jury. C. D. Johnson, a member of the African race was drawn, impanelled, sworn, and served upon the grand jury which returned the bill of indictment in Petitioner's case.

Let us look to the record evidence, as well as the so called "extrinsic evidence" to see whether the proportion of eleven white men to one negro on said

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[18] Snowden v. Hughes, supra, notes 8 and 9.

[19] Akins v. State, supra, note 5.

[20] Snowden v. Hughes, supra; also, see cases cited in note 9.

grand jury represented "actual discrimination" in Dallas County.

According to record testimony[21] the 1940 census shows 336,851 white and 61,605 negroes in the county. On a strictly mathematical basis of calculation as to percentage, the 61,605 negroes represent 15.46 per cent of the total population of 398,456; all other races, creeds and colors 84.54 per cent. Only twelve men may serve on any one grand jury.[22] On the basis of exact proportion of population and population only, the racial representation on grand juries should be 1.8552 negro and 10.1448 all others.

Obviously, population is not and cannot be the sole criterion in determining whether the representation of the colored race is adequate. As has been noted,[23] certain qualifications have been set up by statute; for one thing, it is necessary that a Texas grand juror be able to read and write. On this score, while this court has observed that the census of 1930

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[21] Testimony of Carl F. Barth (R. 34), Regional Manager of the "Western" Department of Commerce.

[22] Constitution of Texas, Art. 5, § 13; Wilson v. State, 117 Tex. Cr. R. 63, 36 S. W. 2d 733.

"This provision has been narrowly construed by the courts, the holdings being uniform to the effect that a body composed of more or less than twelve members cannot constitute a grand jury; that the acts of such a body are nugatory; and that a person held to answer for a crime at its instance is entitled to make objections at any stage of the proceedings." 21 Texas Jurisprudence 82, "Grand Jury" § 4, citing many cases in support.

[23] See Article 339, Texas Code of Criminal Procedure, supra, note 10.

showed "only 7.5 per cent of the negro population of the county to be illiterate,"[24] the percentage of such persons within the native white population as of that census was even less, being only 0.7 per cent.[25] Of a total of the small number of foreign born whites within the county, 7,118 in number, the same census discloses only 350 or 4.9 per cent were illiterate. A combination of the total illiterates of the white race, both native and foreign born whites, shows the percentage of illiteracy in Dallas County to have been exactly .08 per cent of the total of that race. This is in comparison with the rate of "only 7.5 per cent of the negro population of the county."

If we reduce the population totals of each race accordingly, the percentage of representation of negroes eligible by law to serve on a grand jury is likewise reduced.

But, if the basis of grand jury composition is to be determined by a mathematical formula, women of both races must be eliminated, since all women are barred from either grand or petit jury service by provisions of the Texas Constitution and statutes.[26] The same census cited by the Chief Justice

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[24] Hill v. Texas, supra, 316 U. S. 400, 403, 62 S. Ct. 1159, 1161, 86 L. Ed. 1559, 1562.

[25] From "Population Bulletin, Second Series, Texas, Composition and Characteristics of the Population, 15th Census," a United States Department of Commerce publication.

[26] Article 5, § 13, Constitution of Texas; Articles 338, 349, Code of Criminal Procedure of Texas. See Harper v. State, 90 Tex. Cr. R. 252, 234 S. W. 909; Glover v. Cobb (Tex. Civ. App., writ of error refused, Tex. Sup. Ct.) 123 S. W. 2d 794.

of this court in the Hill case[27] shows that of a total negro population of Dallas County, there were 25,-29 females, 22,589 males.[28]

The same census gives a total of 14,894 negro males of the age of 21 years and over, as contrasted with 86,091 of all others, the latter total embracing native whites of both native, foreign or mixed parentage, foreign born whites, naturalized and alien.[29] This would be 14.75 per cent for negroes, 85.25 for all others, or applied to a grand jury of twelve would entitle the negro to 1.77 men on the jury as against 10.23 whites.

The only reference in the record in this case as to the number of colored citizens who had paid their poll taxes,[30] thus qualifying them as potential jurors, is in the testimony of J. F. Jones (R. 41). His statement is that "about six thousand of them paid their poll tax in 1942." Of that number, the witness did not know how many were males. He estimated that there were "about 200 exemptions in that number." We know of no "extraneous evidence" accurately

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[27]Hill v. State of Texas, supra; see note 24.

[28]From "Negroes in the United States, 1920-1932," U. S. Department of Commerce, Bureau of the Census publication.

[29]From "Population Bulletin," U. S. Department of Commerce Bulletin, supra, note 25.

[30]The statute defining the qualifications of a grand juror requires that one selected must be "qualified under the Constitution and laws to vote in said county." Art. 339, C. C. P., supra, note 10.

Texas is one of the states where a poll tax is required as

portraying the true picture as to the number of white and colored paying such taxes.[31]

Nor do we have available any statistics as to the proportionate number of those of each race who are "freeholders within the State" or "householders

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a qualification for voting. Such a tax must be paid by all except those over the age of 60, or otherwise exempt by law from the payment thereof. Constitution of Texas, article 6, § 2; Revised Civil Statutes of Texas, article 2955, et seq.; Vernon's Annotated Civil Statutes of Texas, article 2955 et seq., and many cases cited thereunder.

The grand jury statute (Art. 339, C. C. P., supra, note 10) makes provision for the selection of persons who have not paid such poll tax only "if it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found in the county."

In the case of **Conklin v. State**, 144 Tex. Cr. R. 210, 162 S. W. 2d 416, and followed in the cases of **Smith v. State**, 144 Tex. Cr. R. 247, 162 S. W. 2d 419 and **Conklin v. State**, 144 Tex. Cr. R. 343, 162 S. W. 2d 973, in reversing a conviction the Court of Criminal Appeals held that a court may use as grand jurors only citizens who have paid their poll taxes or were exempt from paying it, unless it appeared that there were not enough citizens so qualified within the county to constitute such grand jury.

[31] In 1942, the total poll tax payments in Dallas County of all races aggregated 50,215, but there appears to be no statistical break-down as to races. Texas Almanac, 1943-1944 at p. 261. According to that publication the table showing poll tax payments in the 254 Texas counties was made up from records of the State Comptroller of Public Accounts. It is said: "Number of exemptions issued to those 60 years old and more is not shown since registration is not compulsory except in cities of 10,000 or more population. An estimate may be made by adding 15 per cent to the total of receipts, though this is not in all instances a reliable method."

within the county.[32] Some information may be gained upon this important requisite, however, by consideration of the figures of the 1940 census which disclose that of a total of 44,604 owner-occupied dwellings in Dallas County, the classification is "White, 41,051; Negro, 3,542; Other non-white 11."[33]

As to the requirement of the statute that a prospective grand juror "must not have been convicted of any felony," [34] we again must admit that we have been unable to find competent statistics. The Federal Bureau of Investigation of the United States Department of Justice places the number of murder and non-negligent manslaughter cases in Dallas, Texas, from January to December, 1944, at 72.[35]

We believe the above to be sufficient for population statistics and mathematical gymnastics. Suffice

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[32] Article 339, Code of Criminal Procedure, note 10, supra. "He must be a freeholder within the State, or a householder within the county."

[33] Source: 16th Census of the United States, 1940. "Housing —Second Series—General Characteristics—Texas." Prepared under supervision of Dr. Leon E. Truesdell, Chief Statistician for Population, Bureau of the Census, Department of Commerce, Washington, D. C.

[34] Article 339, Code of Criminal Procedure, note 10, supra. "He must not have been convicted of any felony."

[35] "Uniform Crime Reports for the United States and its Possessions," Vol. XV, No. 2, Annual Bulletin, 1944. The F. B. I. does not show racial characteristics of criminals in this report, but the Dallas Morning News of February 13, 1945, carries a feature article regarding 59 negro murder cases in Dallas in 1944.

it to say here that if it be contended that the representation of negroes upon a grand jury should conform to exact percentages, calculated upon the basis of the proportion of whites and negroes available and qualified under the law for such service, who can gainsay, that under the facts in this case, the selection of one negro grand juror would meet that test? No source of information is shown to have been available to the commissioners which *would disclose even an approximation of the number of negroes or whites in Dallas County so qualified and in fact no such information appears to be available.* In making their selection, then, the Commissioners were limited to persons known by them to be qualified or those disclosed to be qualified after personal investigation and inquiry. Lacking knowledge on the point, any attempt by the Commissioners to establish proportional representation would be, at most, a rough guess. We think it has been demonstrated above, that whatever the exact proportion of qualified negroes to whites might be, that the proportion of qualified negroes must certainly fall below any calculation based on population alone. Who can say that the selection of one negro grand juror did not more than meet any test of proportional representation? *Certainly it cannot be said that there was "actual discrimination" in this case!*

Considerations, such as required by the statute may just as well be presumed to have been in the minds of the jury commissioners, rather than the presumption of a sinister motive of racial discrimi-

nation. On at least two occasions, this court has said.[36]

> "It may be that the jury commissioners did not give the negro race a full pro rata with the white race in the selection of the grand and petit jurors in this case; still this would not be evidence of discrimination. If they fairly and honestly endeavored to discharge their duty, and *did not in fact discriminate* against the negro race in the selection of the jury lists, then the Constitution of the United States has not been violated. * * * " (Italics supplied).

In the case of *Hamilton* v. *State*, 141 Tex. Cr. R. 614, 150 S. W. 2d 395, certiorari denied 314 U. S. 609, 62, S. Ct. 117, 86 L. Ed. 490, the Court of Criminal Appeals had this to say:

> "We fear that the adoption of a rule that would require a pro rata representation between the white and colored races would result in an admixture of races to meet the possible objections of men of the different races that go to make up the melting pot from which comes the typical American citizen to such an extent that no trial court could give adequate representation to each race in the selection of either commissioners or jurors, and this would especially be so relative to criminal happenings that might take place between the selection of a grand jury list and the empaneling of such grand jury. To deliberately select persons of different races

[36]Thomas v. Texas, 212 U. S. 278, 29 S. Ct. 393, 394, 53 L. Ed. 512, quoting with approval from Martin v. Texas, 200 U. S. 316, 26 S. Ct. 338, 50 L. Ed. 497.

merely because of such difference might assume a discriminatory attitude in favor of such selected persons, and such suggested remedy would amount to a curative for a fancied evil by the use of another evil."

One of the most often cited cases that has been decided by the Supreme Court of the United States on the question of racial discrimination is that of *Pierre* v. *State of Louisiana*, 306 U. S. 354, 59 S. Ct. 536, 83 L. Ed. 757. The reversal of the lower court was ordered in the Supreme Court for the reason that members of the negro race had been systematically excluded from the general venire from which was drawn the grand jury that returned the indictment against Pierre for the murder of a white man, in contravention of the due process clause of the Constitution of the United States.

Following the decision of this court, the defendant, Pierre, was indicted on three additional occasions. Twice the trial court quashed said indictments, but finally the conviction was allowed to stand in the trial court. On appeal to the Supreme Court of Louisiana, that court affirmed the conviction. The opinion is found in *State* v. *Pierre*, 198 La. 619, 3 So. 2d 895, *certiorari denied*, 314 U. S. 676, 62 S. Ct. 186, 86 L. Ed. 541.

Because we feel that the principles of law are so well stated by the Supreme Court of Louisiana, and that while the applicable facts are not exactly the same as in the instant case, the precedent is of value, we quote from the opinion:

"It is counsel's contention that the Jury Commission, in placing only 52 negroes on the general venire list of 300, did not give Pierre the proper *percentage* of representation on the list, directly contrary to the finding of the United States Supreme Court that 49.3 per cent of the population of St. John the Baptist Parish are negroes qualified to serve as jurors.

"In disposing of this issue the trial judge very aptly pointed out that 'There is no law in this State which fixes any proportion or percentage of whites and negroes for jury service, and the Supreme Court of the United States has never held that negroes are entitled to representation on Grand and petit jurors, in proportion to the population as fixed by the preceding census of the United States.'

"The Supreme Court of the United States has held that 'Whenever by any action of a state, whether through its Legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. * * * ' Norris v. Alabama, supra (294 U. S. 587, 55 S. Ct. 580, 79 L. Ed. 1074), 'But that rule does not entitle a person to be tried by a jury composed only of white, or only of black, or mixed persons, and while it is true that there must be no distinction in selecting the jury based on race or color, the jury commission should select persons whom they know to be competent, regardless of wheth-

er they are white or black, and if all but a few of the persons placed on the general venire list happen to be white, it will be presumed, in the absence of evidence to the contrary, that the list was so selected by the jury commission in a fair effort to select the best qualified persons and not with any view of discrimination on account of race or color.' State v. Gill, 186 La. 339, 172 So. 412, 415. See, also, State v. Turner, 133 La. 555, 63 So. 169; Commonwealth of Virginia v. Rives, 100 U. S. 313, 332, 25 L. Ed. 667; and Neal v. Delaware, 103 U. S. 370, 394, 26 L. Ed. 567.

"In the Rives case the defendant sought to have his case removed to the Circuit Court of the United States for the Western District of Virginia because of the state court's refusal to so modify the jury venire, which was composed entirely of white persons, as to allow that one-third thereof be composed of colored men. In disposing of that issue the Supreme Court of the United States said (100 U. S. 322, 25 L. Ed. 667): '* * * the refusal of the court and of the counsel for the prosecution to allow a modification of the venire, by which one-third of the jury, or a portion of it, should be composed of persons of the petitioner's own race (does not) amount to any denial of a right secured to them by any law providing for the equal civil rights of citizens of the United States. *The privilege for which they moved*, and which they also asked from the prosecution, *was not a right given or secured to them, or to any person, by the law of the State, or by any act of Congress, or by the Fourteenth Amendment of the Constitution.* It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty,

or property, there shall be no exclusion of his race, and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the State court, viz. a right to have the jury composed in part of colored men. *A mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia, or by any Federal statute. It is not, therefore, guaranteed by the Fourteenth Amendment* * * *' (Italics and brackets ours).

"In the later case of Neal v. Delaware, supra, the Supreme Court of the United States said: 'We repeat what was said in that case (Commonwealth of Virginia v. Rives), that while a colored citizen, party to a trial involving his life, liberty, or property, cannot claim, as matter of right, that his race shall have a representation on the jury, and while a mixed jury, in a particular case, is not within the meaning of the Constitution, always or absolutely necessary to the equal protection of the laws, it is a right to which he is entitled, 'that in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color.' (Brackets ours).

"It is true that in the Pierre case the United States Supreme Court did point out the percentage of negroes living in St. John the Baptist Parish (49.3 per cent), and the percentage of those who could read and write, but the court did not hold, as contended by counsel for defendant, that the defendant is entitled to be tried by a jury composed of any fixed percentage of

negroes. * * * " (Italics throughout by the court).

Under the Texas statutes governing the selection of grand jurors, it will be noted that not every male person above the age of 21 years, who is qualified to vote, who can read and write, and is a householder in the county or a freeholder in the State, is to be considered a qualified grand juror. He must also be a person of sound mind and good moral character. He must never have been convicted of a felony, and he must not be under accusation of theft or any felony.

Much of the determination of the fitness of a prospective grand juror must, of necessity, be left to sound discretion of the jury commissioners, especially as relates to the "good moral character" of said juror. Under the statutory oath[37] each commissioner binds himself that he will "not knowingly elect any man as juryman" whom he believes "*to be unfit and not qualified.*"

Despite the insistence of Petitioner that the testimony of the three commissioners drawing the grand jury in his case, is conclusive of racial discrimination, we most respectfully, and with equal fervor, insist that while it may be conceded that none of the three intended to place more than one negro upon the grand jury drawn by them, there is nothing to prove that such intention was because of racial prejudice

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[37] Article 335, Code of Criminal Procedure of Texas.

or discrimination against the colored race. We submit that their testimony is entitled to due faith and credit when they declare otherwise.

ARGUMENT AND AUTHORITIES
(Pertinent to Third Counterpoint)

Judge A. R. Stout, District Judge of the 40th Judicial District Court of Texas presided at the trial of Petitioner, although the trial was held in the Criminal District Court of Dallas County. Judge Grover C. Adams, who had been the regularly elected, qualified and acting judge of the Dallas court died prior to the trial of Akins. The Governor of Texas, although vested with the duty, power and authority to do so by express provision of the State Constitution,[38] had not, at the time of the trial, appointed a successor to Judge Adams.

Judge Stout presided upon the trial by virtue of an assignment made by the Presiding Judge of the First Administrative Judicial District of Texas. This was specifically provided for by Legislative enactment. By amendment of the Acts of the 40th Legislature,[39] the 48th Legislature passed the following

[38]Article 5, § 28, Constitution of Texas: "Vacancies in the office of Judges of the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals and District Courts shall be filled by the Governor until the next succeeding general election."

[39]General and Special Laws, 40th Leg., Reg. Sess., ch. 156, p. 228, also printed as § 5, Art. 200a, Vernon's Annotated Civil Statutes of Texas.

statute, which was *approved by the Governor* and became effective on February 17, 1943.[40]

> "Assignment of judges; vacancy in office
> "Judges may be assigned in the manner herein provided for the holding of District Court when the regular Judge thereof is absent or is from any cause disabled or disqualified from presiding, and in instances where the regular District Judge is present or himself trying cases where authorized or permitted by the Constitution and laws of the State; and Judge may also be assigned in the manner herein provided for the holding of a District Court, when by reason of the death, resignation, or from any cause whatsoever, the office of District Judge of the District is or has become vacant."

The contention of Petitioner is that the above act is void because it is in conflict with the Constitution of Texas, and therefore Judge Stout was not authorized to act as trial judge. This, it is averred, deprived the Petitioner of his legal rights in violation of the due process clause of the Federal Constitution.

The Texas Court of Criminal Appeals has sustained the validity of the statute under which Judge Stout was acting in at least four cases prior to this one: *Pierson* v. *State* (Tex. Cr. App.) 178 S. W. 2d 975, followed in *Fuller* v. *State* (Tex. Cr. App.) 180 S. W. 2d 361, *Jones* v. *State* (Tex. Cr. App.) 181 S.

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[40]General and Special Laws, 48th Leg., Reg. Sess. ch. 22, p. 25, printed as § 5, Art. 200a, Vernon's Annotated Civil Statutes of Texas, pocket part.

W. 2d 75, and *Brown* v. *State*, (Tex. Cr. App.) 181 S. W. 2d 93.

The holding in the Pierson case, followed by the other cases cited above, may be summarized for the purposes of this brief. As stated in the notes to Vernon's Annotated Civil Statutes of Texas:[41]

> "The Legislature, under the Constitution to create District Courts, has the exclusive power to destroy the courts, and has power to pass laws to prevent the governor from indirectly destroying the courts by failing to appoint a successor to a deceased district court judge as authorized by the Constitution, and this article, as amended in 1943 providing for the assignment of judges to another district court, where a vacancy occurs by reason of the death of the incumbent, is valid."

The holding of the court in the Pierson case, supra, refutes the argument that the expression of the Constitution providing for the filling of vacancies through appointment by the Governor, is exclusive,[42] by taking into consideration other requirements of the organic law. For instance, it is provided that "The Legislature shall also provide for the holding of District Court when the judge thereof is absent, or is from any cause disabled or disqualified from

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[41] Vernon's Annotated Civil Statutes of Texas, Vol. 1, Art. 200a, cumulative pocket part p. 176.

[42] Art. 5, § 28, Constitution of Texas; see note 34, supra.

presiding.[43] Another section was likewise considered pertinent:[44]

> "And the District Judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law. This disqualification of judges of inferior tribunals shall be remedied and vacancies in their offices filled as may be prescribed by law."

In its opinion in the Pierson case, supra, the Texas court announced no new rule. As long ago as 1878 in the case of *Kelley* v. *Edwards*, 38 Mich. 210, an act of the legislature was sustained which provided that the circuit court commissioner should act as judge of probate when no successor had been elected or appointed, although the Michigan constitution declared that a vacancy in the office should be filled by appointment of the Governor. The court said inter alia:[45]

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[43] Art. 5, § 7, Constitution of Texas.

[44] Art. 5, § 11, Constitution of Texas.

[45] Quoted from L. R. A. 1916E 845. See also, 30 Am. Jur. 807, § 103, "Special and Substitute Judges"; Chandler v. Chandler, 92 Kan. 353, 140 P. 858, L. R. A. 1916E 830, headnote 2:

"The requirements of the Constitution that provision be made by law for the selection by the bar of a pro tem. judge when the regular judge is absent or disqualified does not preclude the legislature from providing other methods of selection." Cf: State v. Stevenson, 89 Ark. 31, 116 S. W. 202; State of North Carolina v. Lewis, 107 N. C. 967, 12 S. E. 457, 11 L. R. A. 105; In re Thompson's Estate, 72 Utah 17, 269 P. 103, 128, citing Kelley v. Edwards, supra; Critchlow v. Monson, 102 Utah 378, 131 P. 2d 794, 800.

"It will be observed that this section of the Constitution makes provision for filling the office with some degree of permanency when there is a vacancy, but does not provide at all for those temporary emergencies which occur when the judge happens to be disqualified by interest or relationship or the like, or when he is sick or absent. The occasions are numerous when the service of a judge is indispensable and urgent and no vacancy exists, and yet he is either disqualified or so situated that he cannot act. It is likewise manifest that many cases are likely to occur of actual vacancy by death, removal or resignation, and where it is in the highest degree important that someone shall be found authorized to step in and act without any delay until an appointment or election, in order to satisfy all necessary calls which may be made from day to day on the jurisdiction, and also to preserve unbroken the continuity of pending proceedings. These emergencies were not, in my judgment, intended to be provided for directly by the Constitution, but were left to be legitimately provided for by wisdom of the legislature."

Thus, we are confident in our belief that upon the merits of this question this court will sustain the Texas court in holding the act under consideration to be valid and constitutional. We submit that the law has been correctly decided and applied in the Pierson case, and that Texas follows the weight of authority of cases from other jurisdictions. The constitutional provision empowering the Governor of Texas to appoint a District Judge in the event of vacancy in the office does not preclude the Texas Legislature from providing a means of carrying on

the business of the court through the assignment of other competent judges during the interim following the vacancy, and prior to the making of a permanent appointment to the office.

In any event, under the fundamental and well known rules and principles of law enunciated by this court in a long list of decisions, the Texas court's holding in the Pierson case, supra, should be upheld. "The decision of the State court, that a State statute has been enacted in accordance with the State constitution, is binding on the Federal Courts."[46] In the case of *Ward & Gow* v. *Krinsky*, 259 U. S. 503, 66 L. Ed. 1033, 42 S. Ct. 529, 28 A. L. R. 1207, as in many others, the rule is stated in the syllabus:

> "In the exercise of the appellate jurisdiction of the Federal Supreme Court over State courts, the former court is bound by the construction of a State law adopted by the State court of last resort."[47]

And this is true even though the Supreme Court is not concluded by the *reasoning* of the State court; it is nevertheless bound by the *construction*.[48] "It is, of course, immaterial that the court may still be of opinion that the State court has erred, or that the

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[46]Cooley's Constitutional Limitations, 8th Ed., Vol. 1, p. 41, citing many cases.

[47]"A decision of a state court of last resort that a state law is not in conflict with the state constitution is binding on the federal courts. * * * "—27 Ruling Case Law, 46, § 51.

[48]Ward & Gow v. Krinsky, supra. Many other cases to the same effect are cited in Cooley's Constitutional Limitations, supra.

decisions elsewhere are different. *Bell* v. *Morrison*, 1 Pet. 351, 7 L. Ed. 174."[49]

Certainly the Petitioner herein was not deprived of due process of law by virtue of Judge Stout having presided at his trial. The question is simply one of determination of whether a state statute conflicts with the Constitution of Texas; out of state authorities support the Texas version, and regardless of that, the Texas court of last resort has decided the question adversely to him. Under all the authorities we have been able to find, this ends the matter.

CONCLUSION

Although we have attempted to carefully answer the contentions of Petitioner upon the third point as urged by him when he sought his court's writ of certiorari, we firmly believe that the basis of his hope for reversal rests upon the question of racial discrimination as presented in his first two points. We likewise believe that this court granted the writ upon that feature of the case.

We are convinced that the true state of the record calls for affirmance of the Texas courts. There is here no question of "exclusion" of colored citizens, for a person of African descent served upon the grand jury which indicted Akins. The trial judge

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[49]Cooley's Constitutional Limitations, supra, note 42, at p. 42.

who died before the instant trial, but who impanelled and instructed the jury commission, carefully urged them to provide adequate representation for all races. His appointees appear to have made a fair investigation, and as a result we submit that they met the demands of the law. We have found no evidence, nor do we think this court will find evidence to support the implication made by Petitioner that the procedure followed comes within the condemnation of this court of being "a thin veneer of compliance." Instead, we submit with all humility that there was an abundance of caution exercised by those charged with the administration of justice to see that the principles enunciated in former opinions of this great court were scrupulously observed.

WHEREFORE, the State of Texas prays that the judgment of the Court of Criminal Appeals of Texas be in all things affirmed.

Respectfully submitted,

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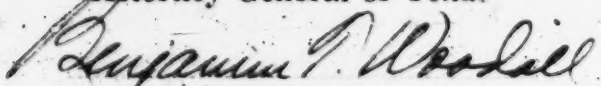

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SUPREME COURT OF THE UNITED STATES.

No. 853.—October Term, 1944.

L. C. Akins, Petitioner, vs. The State of Texas. } On Writ of Certiorari to the Court of Criminal Appeals of the State of Texas.

[June 4, 1945.]

Mr. Justice Reed delivered the opinion of the Court.

This certiorari brings here for review a judgment of the Criminal District Court of Dallas County, Texas, sentencing petitioner to execution on a jury verdict which found petitioner guilty of murder with malice and assessed the penalty at death.

Certiorari was sought to the Court of Criminal Appeals of the State of Texas, which had affirmed the judgment, on a petition which claimed discrimination on account of his race, against the petitioner, who is a Negro, under the equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States.[1] Certiorari was allowed because of the im-

[1] Certiorari was allowed also for alleged denial of due process under the Fourteenth Amendment because of the manner in which the trial judge was designated to conduct the trial court. He acted by assignment of the presiding judge of the First Administrative Judicial District of Texas under General and Special Laws, 48th Leg. Reg. Sess., p. 25 (Vernon's Annotated Civil Statutes, Texas, Art. 200a, §.5) instead of by appointment by the Governor under Section 28, Article 5, of the Constitution of Texas, to fill the vacancy caused by the death of the regularly chosen occupant.

The legality of the assignment depends upon the validity of the provisions of the state statute as tested by the Texas Constitution. The constitutional requirement is that vacancies in the office of judges shall be filled by the Governor. The Texas statute provided for assignment of other judges for the work of the court. This statute was interpreted by the Court of Criminal Appeals to provide merely for the functioning of courts under assigned judges, who did not qualify as successors to decedent judges, until the vacancy was filled by appointment or election. The court upheld the constitutionality of the statute. Pierson v. State, 177 S. W. 2d 975; Fuller v. State, 180 S. W. 2d 361; Jones v. State, 181 S. W. 2d 75; Brown v. State, 181 S. W. 2d 93; Akins v. State, 182 S. W. 2d 723. Whether the state rule is expressed in constitution, statute or decision, or partly in one and partly in another, the state's power is to be viewed as a totality. In the absence of a violation of fundamental principle of justice, a state's determination is conclusive upon the federal courts as to the meaning of the state law, so far as any federal question is concerned. Hebert v. Louisiana, 272 U. S. 312, 316; Gregg Dyeing Co. v. Query, 286 U. S. 472, 479-80; United Gas Co. v. Texas, 303 U. S. 123, 141-42. We find no violation of any of petitioner's federal rights in Texas' decision upon the legality of the organization of the court which tried petitioner.

portance in the administration of criminal justice of the alleged racial discrimination which was relied upon to support the claim of violation of constitutional rights. 324 U. S. —. This discrimination was said to consist of an arbitrary and purposeful limitation by the Grand Jury Commissioners of the number of Negroes to one who was to be placed upon the grand jury panel of sixteen for the term of court at which the indictment against petitioner was found. This is petitioner's only complaint as to racial discrimination. No other errors in the proceedings are pointed out.

The Fourteenth Amendment forbids any discrimination against a race in the selection of a grand jury.[2] *Neal* v. *Delaware*, 103 U. S. 370, 394; *Pierre* v. *Louisiana*, 306 U. S. 354, 356; *Smith* v. *Texas*, 311 U. S. 128; *Hill* v. *Texas*, 316 U. S. 400. The burden is, of course, upon the defendant to establish the discrimination. *Tarrance* v. *Florida*, 188 U. S. 519, 520; *Martin* v. *Texas*, 200 U. S. 316; *Norris* v. *Alabama*, 294 U. S. 587, 590. An allegation of discriminatory practices in selecting a grand jury panel challenges an essential element of proper judicial procedure—the requirement of fairness on the part of the judicial arm of government in dealing with persons charged with criminal offenses. It cannot lightly be concluded that officers of the courts disregard this accepted standard of justice.

The order overruling the motion to quash the indictment was made after evidence and without opinion. That motion set out the alleged purposeful limitation on racial representation which is pressed here. The Court of Criminal Appeals, however, without a written analysis of the testimony, said in an opinion that it failed "to find any evidence of discrimination. On the contrary the evidence shows an effort on the part of the authorities to comply with the holding of this court and of the Supreme Court of the United States upon the question of discrimination." *Akins* v. *State*, 182 S. W. 2d 723. This reference to the holdings of the state and federal courts was to *Akens* v. *State*, 167 S. W. 2d 758, which reversed a previous conviction of petitioner on the authority of *Hill* v. *Texas*, *supra*. Although this opinion of the Court of Criminal Appeals does not refer to proportional racial representation on juries, recent decisions of that court had pre-

[2] Constitution, Fourteenth Amendment, Section 1: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

viously disapproved that procedure. *Hamilton* v. *State*, 150 S. W. 2d 395, 400, r. c.; *Hill* v. *State*, 157 S. W. 2d 369, 373, l. c., reversed on other grounds; 316 U. S. 400. We think, therefore, that the conclusions of the state courts show that in their judgment there was no proven racial discrimination by limitation in this case. Otherwise there would have been a reversal by the Court of Criminal Appeals.

As will presently appear, the transcript of the evidence presents certain inconsistencies and conflicts of testimony in regard to limiting the number of negroes on the grand jury. Therefore, the trier of fact who heard the witnesses in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as to the existence of that type of discrimination. While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a federal constitutional right has been denied, expressly or in substance and effect, *Norris* v. *Alabama*, 294 U. S. 587, 589-90; *Smith* v. *Texas*, 311 U. S. 128, 130, we accord in that examination great respect to the conclusions of the state judiciary, *Pierre* v. *Louisiana*, 306 U. S. 354, 358. That respect leads us to accept the conclusion of the trier on disputed issues "unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process," *Lisenba* v. *California*, 314 U. S. 219, 238, or equal protection. Cf. *Ashcraft* v. *Tennessee*, 322 U. S. 143, 152, 153; *Malinski* v. *New York*, No. 367, this Term, slip opinion, p. 2.

The regular statutory practice for the selection of grand jurors was followed in this case. Under the Texas statutes jury commissioners appointed by the judge of the trial court select a list of sixteen grandjurymen from which list twelve are chosen as a grand jury. Texas Code of Criminal Procedure, Articles 333, 337. Qualifications for grandjurymen are set out in Article 339.[3] The Commissioners are instructed by the court as to their duties.

[3] Art. 339. "No person shall be selected or serve as a grand juror who does not possess the following qualifications:

"1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found within the

Art. 366. This method of selection leaves a wide range of choice to the commissioners. Its validity, however, has been accepted by this Court. *Smith* v. *Texas,* 311 U. S. 128, 130. Petitioner does not attack it now. Its alternative would be a list composed of all eligibles within the trial court's jurisdiction and selection of the panel by lot.

Petitioner's sole objection to the grand jury is that the "commissioners deliberately, intentionally and purposely limited the number of the Negro race that should be selected on said grand jury panel to one member." Fairness in selection has never been held to require proportional representation of races upon a jury. *Virginia* v. *Rives,* 100 U. S. 313, 322-23; *Thomas* v. *Texas,* 212 U. S. 278, 282. Purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals. The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection. Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried. But such defendants are entitled to require that those who are trusted with jury selection shall not pursue a course of conduct which results in discrimination "in the selection of jurors on racial grounds." *Hill* v. *Texas, supra,* 404. Our directions that indictments be quashed when Negroes, although numerous in the community, were excluded from grand jury lists have been based on the theory that their continual exclusion indicated discrimination and not on the theory that racial groups must be recognized. *Norris* v. *Alabama, supra; Hill* v. *Texas, supra; Smith* v. *Texas, supra.* The mere fact of inequality in the number selected does not in itself show discrimination. A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional

county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.

"2. He must be a freeholder within the State, or a householder within the county.

"3. He must be of sound mind and good moral character.

"4. He must be able to read and write.

"5. He must not have been convicted of any felony.

"6. He must not be under indictment or other legal accusation for theft or of any felony."

discrimination. Cf. *Snowden* v. *Hughes*, 321 U. S. 1, 8. Any such discrimination which affects an accused will make his conviction unlawful.

The history and record of this case gives evidence that the courts of Texas which are charged with the trial of petitioner endeavored to comply with the federal constitutional requirements as to the selection of grand juries, according to the interpretation of this Court in *Hill* v. *Texas, supra*. Not only did the Court of Criminal Appeals reverse a former conviction of petitioner on its authority but the judge, now deceased, of the criminal district court of Dallas instructed the three jury commissioners, who selected this grand jury list, as testified to by each of them, that there should be no discrimination against anyone because of his color.[4]

Hill v. *Texas, supra*, was decided June 1, 1942. The trial court has four terms a year—January, April, July and October. After the *Hill* decision, the jury commissioners who were appointed at the July 1942 term to select grand jurors for the October 1942 term, Texas Code of Criminal Procedure, Arts. 333 and 338, placed a Negro on the grand jury list although he did not serve. Under the instructions of the judge as just detailed, the commissioners for the January 1943 term, at which petitioner was indicted, placed a Negro on the list and he served as a grand juror. Prior to the decision in the *Hill* case, it does not appear that any colored person had ever served on a grand jury in Dallas County.

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[4] Commissioner Wells: "In the selection of our panel of sixteen for the grand jury the way we determined whom we would put on that list was, we were advised by Judge Grover Adams that the Supreme Court had ruled that we could not discriminate against any one because of his color, as I recall, they had not been discriminating for selection on the grand jury panel; and in turn they said there were sixteen, and it would be further evident if we placed one among the twelve so as to make it clear."

Commissioner Tennant: "When the grand jury commissioners were appointed by Judge Adams the only thing I remember he said is that we could not discriminate against the negro population being represented on the grand jury. No, he just outlined if he could qualify as a grand juror. In this particular instance we selected one negro on this panel; so far as I am concerned, I read in the paper that the Supreme Court of the United States stated that a negro could sit on the grand jury. . . . Judge Adams never mentioned to us about putting one negro on the grand jury, or five or ten. Yes, that there must be representation for the race."

Commissioner Douglas: "At that time Judge Adams, the judge of this court made some reference or instructions about how to select the grand jury. He thought it well to select negroes on the grand jury. He said he thought it would be well to select a negro on the grand jury. There was no further discussion about that. We did select a negro on the grand jury. All three of us went out there to see him. We all went and talked to just one negro and that is the one we selected."

On the precise act of discrimination by the jury commissioners which is asserted by petitioner, that is the deliberate, intentional and purposeful limitation to one of the number of Negroes on the grand jury panel, the record shows as follows. About fifteen and one-half per cent of the population of Dallas County, Texas, is negro. A substantial percentage of them are qualified to serve as grand jurors. No exact comparison can be made between the white and negro citizens as to the percentage of each race which is eligible. On the strictly mathematical basis of population, a grand jury of twelve would have 1.8552 negro members on the average. Of course, the qualifications for grand jury service, note 3 *supra*, would affect the proportion of eligibles from the two races. As one member of the Negro race served upon the grand jury which indicted petitioner and one had appeared upon the other grand jury list which had been selected after the decision in *Hill* v. *Texas*, we cannot say that the omission from each of the two lists of all but one of the members of a race which composed some fifteen per cent of the population alone proved racial discrimination.

In connection with that fact of omission, we must appraise the testimony offered to show the intentional limitation. Besides the language quoted in note 4, *supra*, which relates particularly to the court's instructions, other relevant evidence of such intention is found only in the testimony of the commissioners. They made these statements as to their intentions:

Commissioner Wells: "There was nothing said about the number and nothing was said about the number on the panel. . . . We had no intention of placing more than one negro on the panel. When we did that we had finished with the negro. That was the suggestion of the others and what Judge Adams thought about the selection of the grand jury. . . . Judge Adams did not tell us to put one negro or five negroes on the grand jury. Yes, we just understood to see that negroes had representation on the grand jury, and we went out to see this particular one because we did not know him. . . . Among the white people whose names might go on the grand jury, unless I knew them personally and knew their qualifications, we went out and talked to them. No, we did not discriminate against a white man or a negro. I attempted not to."

Commissioner Tennant: "We three did not go to see any other negroes, that is the only one. I did not have any intention of putting more than one on the list; I could not think of anybody;

I would have if I could have thought of another one, and putting one on."

Commissioner Douglas: "Yes, sir, there were other negroes' names mentioned besides the one we selected; we did not go talk to them; we liked this one, and our intentions were to get just one negro on the grand jury; that is right. No, I did not have any intention of placing more than one negro on the grand jury. . . . We never agreed to select any certain number, but when we found one with all the qualifications of a grand juror we felt like that was satisfactory representation. . . . No, sir, we did not have in mind to put any set number of representatives of the various races. . . . We did not agree to put eleven negroes and one white man on, no. That is right, all that we were endeavoring to get a fair and impartial grand jury without any discrimination against any race on earth. We did not have in mind, or the other commissioners, to put any set number on of any race, white, yellow or what-not."

A careful examination of these statements in connection with all the other evidence leaves us unconvinced that the commissioners deliberately and intentionally limited the number of Negroes on the grand jury list. The judge who heard the witnesses on the motion to quash did not find that type of discrimination. The law of their state, the instructions of the judge, their oath of office required them to choose prospective jurors on their statutory qualifications and without regard to their color or the number of representatives of various races who might appear upon the list. We cannot say the commissioners violated these obligations.

This conclusion makes it unnecessary to decide whether a purposeful limitation of jurors by race to the approximate proportion that the eligible jurymen of the race so limited bears to the total eligibles is invalid under the Fourteenth Amendment.

The judgment is

Affirmed.

Mr. Justice Rutledge concurs in the result.

The Chief Justice and Mr. Justice Black dissent.

SUPREME COURT OF THE UNITED STATES.

No. 853.—October Term, 1944.

L. C. Akins, Petitioner, vs. The State of Texas. } On Writ of Certiorari to the Court of Criminal Appeals of the State of Texas.

[June 4, 1945.]

Mr. Justice Murphy, dissenting.

The equal protection clause of the Fourteenth Amendment entitles every person, whose life, liberty or property is in issue, to the benefits of grand and petit juries chosen without regard to race, color or creed. This constitutional principle is a fundamental tenet of the American faith in the jury system. The absence of such a principle would give free rein to those who wittingly or otherwise act to undermine the very foundations of this system and would make juries ready weapons for officials to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities.

The State of Texas in this instance appears to have made a sincere effort to obey this constitutional mandate in selecting the grand jury which indicted the Negro petitioner. Until this Court's decision in 1942 in *Hill* v. *Texas*, 316 U. S. 400, no Negro ever served on a grand jury in Dallas County, Texas, where this case arose. In an attempt to comply with that decision the three jury commissioners were careful here to appoint one Negro to the sixteen-member grand jury panel; he qualified and served on the twelve-man jury. Thus it cannot be said that Texas has systematically and completely excluded Negroes from the grand jury. Cf. *Norris* v. *Alabama*, 294 U. S. 587; *Pierre* v. *Louisiana*, 306 U. S. 354; *Smith* v. *Texas*, 311 U. S. 128; *Hill* v. *Texas*, *supra*. But that fact alone does not guarantee compliance with the Fourteenth Amendment, however commendable may be the attempt. Racial limitation no less than racial exclusion in the formation of juries is an evil condemned by the equal protection clause. "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson*, 307 U. S. 268, 275. This case must therefore be reviewed with that in mind.

Petitioner, as a Negro, "cannot claim, as matter of right, that his race shall have a representation on the jury," *Neal* v. *Delaware*, 103 U. S. 370, 394, inasmuch as "a mixed jury in a particular case is not essential to the equal protection of the laws," *Virginia* v. *Rives*, 100 U. S. 313, 323. But petitioner, as a human being endowed with all the rights specified in the Constitution, can claim that no racial or religious exclusion, limitation or other form of discrimination shall enter into the selection of any jury which indicts or tries him.

It follows that the State of Texas, in insisting upon one Negro representative on the grand jury panel, has respected no right belonging to petitioner. On the contrary, to the extent that this insistence amounts to a definite limitation of Negro grand jurors, a clear constitutional right has been directly invaded. The equal protection clause guarantees petitioner not only the right to have Negroes considered as prospective veniremen but also the right to have them considered without numerical or proportional limitation. If a jury is to be fairly chosen from a cross section of the community it must be done without limiting the number of persons of a particular color, racial background or faith—all of which are irrelevant factors in setting qualifications for jury service. This may in a particular instance result in the selection of one, six, twelve or even no Negroes on a jury panel. The important point, however, is that the selections must in no way be limited or restricted by such irrelevant factors.

In this case the State of Texas has candidly admitted before us "that none of the three [jury commissioners] intended to place more than one Negro upon the grand jury drawn by them." Commissioner Wells testified that "We had no intention of placing more than one Negro on the panel. When we did that we had finished with the Negro." In the words of Commissioner Tennant, "We three did not go to see any other Negroes, that is the only one. I did not have any intention of putting more than one on the list." Finally, as Commissioner Douglas stated, "Yes, sir, there were other Negroes' names mentioned besides the one we selected; we did not go talk to them; we liked this one, and our intentions were to get just one Negro on the grand jury; that is right. No, I did not have any intention of placing more than one Negro on the grand jury."

Clearer proof of intentional and deliberate limitation on the basis of color would be difficult to produce. The commissioners' declarations that they did not intend to discriminate and their other inconsistent statements cited by the Court fade into insignificance beside the admitted and obvious fact that they intended to and did limit the number of Negroes on the jury panel. By limiting the number to one they thereby excluded the possibility that two or more Negroes might be among the persons qualified to serve. All those except the one Negro were required to be of white color. At the same time, by insisting upon one Negro, they foreclosed the possibility of choosing sixteen white men on the panel. They refused, in brief, to disregard the factor of color in selecting the jury personnel. To that extent they have disregarded petitioner's right to the equal protection of the laws. To that extent they have ignored the ideals of the jury system. Our affirmance of this judgment thus tarnishes the fact that we of this nation are one people undivided in ability or freedom by differences in race, color or creed.